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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 94

M. D. HOGGARD, INDIVIDUALLY, ETC., AND [illegible]
MOTOR EXPRESS, INC., PETITIONERS

vs.

J. C. CONEY, EARL C. [illegible], SAM C. [illegible]
ET AL., ETC.

[illegible]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 94

M. D. HICKLIN, INDIVIDUALLY, ETC., AND BLALOCK MOTOR EXPRESS, INC., APPELLANTS,

vs.

J. C. CONEY, EARLE R. ELLERBE, SAM C. BLEASE, ET AL., ETC.

APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

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[fols. 1 & 2 & 3]

IN SUPREME COURT OF SOUTH CAROLINA IN THE ORIGINAL JURISDICTION

J. C. Coney, Earle R. Ellerbe, Sam C. Blease, J. H. Nance, Thomas H. Tatum, J. A. Beamguard, and B. J. Pearman, as Members of and Constituting the Railroad Commission of South Carolina, Petitioners,

against

M. D. Hicklin, Individually, and as a Representative of Class "B" Carriers Within the Provisions of Sections 8507-8530 of Chapter 162 of the South Carolina Code of 1932, Who are, or Claim to be, Engaged in Interstate Commerce, as Well as Intrastate Operations Within the State of South Carolina, Respondents

[fol. 4] Order to Show Cause

To the respondents above named:

Upon reading and considering the attached petition and upon motion of the attorneys for the said petitioners,

You are hereby

Ordered and directed to file your return to the petition above named in this Court, and serve a copy thereof upon the petitioners' attorneys, within twenty days from the date hereof, and further to show cause at the next session, regular or special, of the Supreme Court of South Carolina why the said motor transportation acts referred to in the petition should not be construed and enforced, and why you should not be enjoined and restrained from carrying on your said motor transportation business in the State of South Carolina except by compliance with the said acts and with the Rules and Orders of the Railroad Commission issued thereunder, and why the relief prayed for in the said petition should not be granted; and in the meantime pending the final determination of this case by this Court, the petitioners herein, their agents and servants, and all other persons, are hereby enjoined and restrained from, in any wise enforcing any of the Acts therein mentioned, or any of the Rules or Orders of the Railroad Com-

mission thereunder, or any of respondents' alleged liabilities thereunder, against the respondents herein.

John G. Stabler.

August, 1932.

IN SUPREME COURT OF SOUTH CAROLINA

PETITION

To the Supreme Court of South Carolina:

The petition of the above named petitioners respectfully shows to this Honorable Court:

1. That the petitioners above named, J. C. Coney, Earle R. Ellerbe, Sam C. Blease, J. H. Nance, Thomas H. Tatum, J. A. Beamguard and B. J. Pearman, constitute the Rail- [fol. 5] road Commission of South Carolina, and as such are charged with the duty among other things of enforcing the laws of the State of South Carolina regulating motor transportation, particularly the laws relating to motor bus and truck lines contained in Sections 8507-8530 of Chapter 162 of the South Carolina Code of 1932.

2. On information and belief that the respondent is now and has been for several years engaged in the business of motor transportation as a contract hauler of freight and property for compensation over the highways of the State of South Carolina, and is a resident and citizen of the State of South Carolina, with offices in the City of Columbia, in the State of South Carolina, and comes within the jurisdiction of the Railroad Commission; and that there are many other persons in like situation with the respondent, and that this suit is brought against the respondent as a representative of the class of contract carriers coming within Class "F" as defined by the terms of the said laws regulating motor transportation who are, or claim to be, engaged in Interstate Commerce, as well as intrastate operations within the State of South Carolina.

3. That the respondents come within Class "F" of Motor Vehicle Carriers, defined in the amendatory Act of April 7, 1930, as consisting of persons, firms or corporations proposing to engaged in the business known as contract haul-

ing of freight or property but not proposing to operate upon a regular schedule or over a regular route or to receive patronage along the route, and that as such the said respondents are required by said Act to obtain a certificate to operate and to pay the license fee therefor.

4. That the said respondents are now carrying on their motor transportation business in the State of South Carolina over the public highways without any certificate and without paying any of the fees or taxes therefor, and in violation of the said laws hereinabove mentioned and of the orders and rules of the Railroad Commission issued thereunder.

[fol. 6] 5. That as petitioners are informed and believe the respondents contend that the said Acts under which they are required to obtain the said certificates and pay the said fees and taxes are unconstitutional and void, particularly in that they purport in Section 2 of the Acts of 1925 (S. 8508 of the Code of 1932) to exempt from the operations thereof farmers and dairymen, hauling dairy and farm products, or lumber haulers engaged in transporting lumber and logs, in violation of the 14th Amendment and the due process clause, and also in that they constitute a burden upon respondents' interstate operations and hence are in violation of the Interstate Commerce clause of the United States Constitution, and that the said respondents have instituted a suit in the United States District Court for the Eastern District of South Carolina against these petitioners for the purpose of having the said Acts declared unconstitutional, and that the said suit is now pending in the said Court, and has not been brought to a final hearing, all of which will more fully appear by reference to the suit entitled M. D. Hicklin against J. C. Coney and others, defendants, reference to which is craved.

6. That as petitioners are advised and believe the said Acts hereinabove referred to are valid and constitutional; (a) that the proviso contained in Section 2 of the Acts of 1925 (S. 8508 of the Code of 1932) relating to farmers and dairymen and lumber haulers was and is mere surplusage, was intended in fact to exempt such persons only when they were hauling their own products and not engaged in transportation for hire, and that the said proviso has been

and is being so construed by the petitioners herein, but that if the said proviso should be for any reason construed as unconstitutional or invalid, then the said proviso should be stricken out of the said Acts and the said Acts declared valid and constitutional in all remaining terms thereof; and that the said acts have not been and are not being applied so as to discriminate against the respondents herein; (b) and that the said Acts were not intended to be construed [fol. 7] and have not been construed by petitioners herein to interfere with any of respondents' rights under the Interstate Commerce Clause of the United States Constitution.

7. That this action is brought for the purpose of enforcing the said Acts hereinabove referred to, to wit, Sections 8507 through 8530 of Chapter 162 of the South Carolina Code of 1932, and of requiring the said respondents to comply with said Acts and the rules and orders of the Railroad Commission thereunder, and to show by what authority if any they are continuing to operate their motor transportation business in the State of South Carolina without complying with the aforesaid Acts, and for the purpose of enjoining and restraining the said respondents from operating their motor transportation business in the State of South Carolina except by obtaining the certificate, paying the fees, and otherwise complying with the said Acts.

Wherefore petitioners pray that the said Acts hereinabove referred to regulating motor transportation in the State of South Carolina be construed and enforced by this Court, and that the respondents be ordered and directed to comply with the said Acts regulating the said motor transportation business in the State of South Carolina, and be so enjoined and restrained from carrying on the said business except by complying with the said laws.

3 August, 1932.

John M. Daniel, Attorney General; Cordie Page, Assistant Attorney General; J. Ivey Humphrey, Assistant Attorney General; Irvine F. Belser; Special Counsel for the Railroad Commission, Attorneys for Petitioners.

[fol. 8] *Duly sworn to by Jno. C. Coney. Jurat omitted in printing.*

IN SUPREME COURT OF SOUTH CAROLINA

RETURN AND ANSWER

The respondent M. D. Hicklin in his individual capacity and as a representative of Contract or Class "F" Carriers of freight, reserving his rights under the demurrer herewith served, for a return and answer to the petition herein, by his attorneys R. Wofford Wait and James H. Fowles:

1. Admits the truth of the allegations of paragraphs 1, 3, 5, and 7 of the petition herein.

2. Admits all of the facts alleged in the second and fourth paragraphs of the petition, but denies the legal conclusions thereof that the respondent is subject to the jurisdiction, control and regulation of the petitioners or that the respondent is now operating in violation of law.

3. Denies the allegations of paragraph 6 of the petition.

4. Specifically denies each and every allegation of fact and conclusion of law in the petition contained, save as herein admitted and modified.

5. Further answering, respondent says that as to him and all other Class "F", or contract, carriers, said Act No. 170 of 1925, as amended, now appearing as Sections 8507 to 8524, both inclusive, of Chapter 162, Volume III. Code of Laws of South Carolina, 1932 (hereinafter, for the sake of brevity, cited as the "Civil Code"), is unconstitu- [fol. 9] tional and void, in that in Section 8508 of the Civil Code (Section 2 of Act No. 170 of 1925, as amended) it is provided:

"That nothing in sections 8507 to 8524 contained shall apply to motor vehicles while used exclusively for transportation of persons to and from schools, Sunday schools, churches, or religious services of any kind, or to and from picnics or upon special or pre-arranged excursions, or to United States mail carriers operating star routes while engaged solely in carrying mail, or farmers or dairymen, hauling dairy or farm products; or lumber haulers engaged in transporting lumber or logs fom the forest to the shipping points":

and respondent says that the said exceptions and exclusions deny to him the equal protection of the law, and

deprives him of his property without due process of law, in contravention of the Fifth and Fourteenth Amendments to the Constitution of the United States of America, and in violation of Article I, Section 5 of the Constitution of the State of South Carolina. Respondent denies that the proviso to Section 8509 of the Civil Code above quoted "was and is mere surplusage, and was intended in fact to exempt such persons only when they were hauling their own products and not engaged in transportation for hire", as alleged in paragraph 6 of said petition, and says, on the contrary, that it was the express intention of the legislature to exclude from the operation of said Act the persons and classes mentioned and described in said proviso. Respondent denies that the petitioners have either limited or attempted to limit the exemptions in said proviso relating to farmers, dairymen and lumber haulers to such persons only when hauling their own products, and says that if the petitioners have so construed the said proviso, as alleged, their action in so doing has been utterly unwarranted, illegal, ultra vires, and in flagrant violation of their duty. That it is beyond the power of this Court, should it hold that the exemptions in said proviso render the said Act [fol. 10] unconstitutional, to "strike out" the proviso, as that is a purely legislative function; and if the effect of said proviso is to exempt certain favored classes from the application to them of the requirements of said Act, it necessarily renders the whole Act bad in all of its provisions relating to Class "F", or contract, carriers.

6. Further answering, respondent says that the tax or assessment provided in Section 34 of the General Appropriation Act of 1932 for the support of the Motor Transport Division of the Railroad Commission and therein required to be paid by the "Motor Transport Carriers for hire subject to the regulation of the Railroad Commission" is unconstitutional and void as to him and all other Class "F", or contract, carriers, because they are not "subject to regulation by the Railroad Commission" in as much as Act No. 170 of 1925, as amended (Chapter 162, Civil Code), is unconstitutional and void as to them, as hereinbefore set forth.

7. That said Act No. 170 of 1925, as amended (Civil Code, Chapter 162), is also unconstitutional and void as

to this respondent and all other Class "F", or contract, carriers, in two other respects: (a) because it seeks to impose upon him and them all of the burdens, duties and liabilities of common carriers, especially with reference to the requirements (Section 8511) relating to cargo insurance; and (b) because it imposes upon the Railroad Commission (Section 8516) the duty—which, however, so far the said Commission has never undertaken to perform or discharge—of regulating the rates and charges of private or contract carriers, as well as those of common carriers, the doing of which would deprive them of their property without compensation, in violation of the aforesaid constitutional provisions.

Wherefore, your respondent prays that he be adjudged to have answered fully the order and rule to show cause heretofore issued herein, that the provisions of Chapter 162 of the Civil Code applicable to Class "F", or contract, carriers, be declared to be unconstitutional and void, that [fols. 11–11c] the petitioners herein, their agents, servants and employees, and all other persons, be permanently restrained and enjoined from enforcing in any wise, or attempting to enforce, the Acts mentioned and referred to in the order and rule to show cause herein, or any of the several provisions thereof, applicable to Class "F", or contract, carriers, or any of the rules or orders of the Railroad Commission thereunder, or any of the respondent's alleged liabilities thereunder, against the respondents and those whom he represents, and that the petition herein be dismissed, with costs.

And your respondent will ever pray, etc.

B. Wofford Wait, James H. Fowles, Solictors for Respondent.

Columbia, South Carolina, August 22, 1932.

Duly sworn to by M. D. Hicklin. Jurat omitted in printing.

Acceptance of Service

Service accepted and a copy retained at Columbia, South Carolina, this 22nd day of August, 1932.

——— ———, Attorney for Petitioners.

[fol. 12] IN SUPREME COURT OF SOUTH CAROLINA

REPLY

To the Honorable Eugene S. Blease, Chief Justice; T. P. Cothran, Associate Justice; John G. Stabler, Associate Justice; Jesse F. Carter, Associate Justice; M. L. Bonham, Associate Justice:

The petitioners above named, by way of reply to the Return and Answer of the Respondents in the above entitled case, would respectfully show to this Honorable Court:

[fol. 13] 1. That your petitioners, constituting the Railroad Commission of the State of South Carolina, have uniformly construed the Motor Transportation Acts referred to in the petition herein, as exempting farmers and dairymen only when hauling their own product-, or only when hauling them occasionally and not as a regular business, and that the Commission has recently adopted a formal regulation to that effect, and has had the same duly promulgated to all motor transportation carriers operating for hire in the State of South Carolina:

That the said regulation so promulgated is as follows:

"The proviso under Section 2 of Act No. 170 of the Acts of 1925, as amended, providing that nothing contained in said section shall apply to farmers or dairymen hauling dairy or farm products is construed by the Railroad Commission in the performance of its duties in the enforcement of said Act to mean that nothing in the said section shall apply to farmers or dairymen hauling their own dairy or farm products, or to farmers and dairymen who occasionally, but do not regularly as a part of an established business, haul farm and/or dairy products for others for hire, but that persons who may also be engaged in part in farming operations but who make a regular business of transporting farm and/or dairy or other products for others for hire are not to be deemed farmers or dairymen for the purpose of this Act, and hence are required to comply with the act in all respects like other persons engaged in motor transportation for hire."

That there is attached hereto, and made a part hereof, an affidavit of W. W. Goodman, Superintendent of the

Motor Transportation Division, which shows in detail how the said Act has been, and is being, enforced so far as the said exemptions are concerned.

2. That moreover, the petitioners know of their own personal knowledge, and this Court should take judicial notice thereof, that farmers and dairymen, in so far as they use [fol. 14] the highways of the State of South Carolina at all, use them only seasonally and spasmodically; that there are practically only two seasons in the year when there is any occasion whatsoever for the farmers to make any use of the highways, that is during the months of May, June, and July, when certain truck crops are harvested, and during the fall months of September, October, and November, when the staple crops, such as cotton, corn and peas, are harvested, but that the use made by farmers of the said highways is very small and relatively insignificant as compared with the use made of such highways by the respondents and others regularly engaged in the business of contract hauling for compensation over the highways of the State of South Carolina:

That moreover such farmers and dairymen as do use the highways of the State of South Carolina generally have very small and light trucks and engage in only very short hauls:

That on the contrary respondents and others in like situation engaged regularly in the business of transport hauling make a much more extensive use of the highways, operating throughout the State from one end to the other, and furthermore use much heavier and larger trucks. Consequently, the wear and tear upon the highways in the State of South Carolina from persons regularly engaged in contract hauling for hire, such as the respondents herein, is much more serious than that occasioned by farmers and/or dairymen, and/or lumber hauling:

That in general the same statements hereinabove made as applicable to farmers are also applicable to dairymen and lumber haulers, and that as hereinabove shown in the regulation promulgated by this Commission, when and if farmers and/or dairymen engage regularly in the business of hauling for others for compensation, they are no longer deemed to be farmers or dairymen for the purpose of this Act and, hence are required to comply with the Act like all other persons engaged in transportation for hire.

[fol. 15] The said Act as so construed by your petitioners, and as the same should be construed, is entirely valid and constitutional and works no unlawful discriminations against the respondents herein.

As to the remaining allegations of the said answer and return:

Petitioners allege and show to this Court that the said answer and return do not constitute or show any defense in this suit to the petition and order heretofore issued herein, that there is no allegation or showing that the petitioners have unlawfully interfered with the respondents' interstate operations, and that your petitioners did not in any way improperly or unlawfully interfere with respondents' interstate operations; that there is no showing or contention that the petitioners have in any way interfered with any of respondents' constitutional or other rights, and hence that the said petition should be granted and that judgment should be rendered by this Honorable Court as prayed for in the said petition.

Wherefore your petitioners pray that the said answer and return be declared insufficient, and that the Court grant the relief prayed for in the petition.

Columbia, S. C., October 5, 1932.

John M. Daniel, Attorney General. Cordie Page, Assistant Attorney General. Irvine F. Belser, Special Counsel for Railroad Commission of South Carolina.

[fol. 16] *Duly sworn to by Jno. C. Coney. Jurat omitted in printing.*

Affidavit of W. W. Goodman

Personally appeared before me W. W. Goodman, who being first duly sworn, deposes and says, that, as Superintendent of the Motor Transportation Division of the Railroad Commission of South Carolina, he occupied this position since January 1, 1926, and that he has been connected with the work ever since the passage of the Act in 1925; that, in his work he has been personally familiar with every license issued under the provisions of the Act since the passage of the Act of 1925; that, the Act has been construed and applied uniformly to persons carrying on the

business of transporting property for hire over the public highways of the State; that, all persons coming within the class of contract carrier and operating over the highways of this State for compensation are required to secure a Class F Certificate, and pay the fee, and if any person operates over the highways of the State for compensation without securing the license it is without the knowledge of deponent or the Railroad Commission; that, he knows of his own knowledge that the Railroad Commission has not and is not exempting any persons from the payment of the tax who is carrying on the business similar to the respondent in this action; that, there are a number of farmers, [fols. 17 & 18a] dairymen, and lumbermen, paying the tax when they operate on the highways for compensation, as does the respondent herein; that, he does not recall specifically the names of farmers who are operating as the papers on file do not show that they are farmers and, therefore, he is unable to give the names of individual farmers who are paying the tax, but that he knew at the time the licenses were granted that the applicants were farmers; that, the Milk Transport Company of Denmark, South Carolina, is required to pay the fee for hauling dairy products; that, Jerry T. Riley, of Ridgeville, South Carolina, runs a dairy and farm, hauls his own products and the products of others for compensation, and is, therefore, required to pay the fee provided in the Act; that, the Standard Lumber Company of Orangeburg, South Carolina, is operating under a Class F Certificate and pays the fee provided by the Act; that, persons hauling fruit from Florida over the highways of this State for compensation are paying the tax, and if any such persons, or any other persons, are using the highways for compensation without securing the license and paying the fee provided in the statute, it is unknown to The Railroad Commission of South Carolina; that, there may be those who violate the law without the knowledge of The Railroad Commission, but no person is operating on the highways for compensation as a part of a regular business with the approval or consent of the Commission, without obtaining the Certificate and paying the fees.

(Signed) (Signature of Affiant) W. W. Goodman
L. S.

Sworn to and subscribed before me at Columbia, South Carolina, this 16th day of December, 1931. (Signed) D. Fred Little, Notary Public in and for South Carolina.

[fol. 18b] IN SUPREME COURT OF SOUTH CAROLINA

Case No. 339

THE STATE OF SOUTH CAROLINA ex Relatione J. C. CONEY, Earle R. Ellerbe, Sam C. Blease, J. H. Nance, Thomas H. Tatum, J. A. Beamguard, and B. J. Pearman, as Members of and Constituting the Railroad Commission of South Carolina, Petitioners,

vs.

M. D. HICKLIN, Individually and as a Representative of Class "F" Carriers Within the Provisions of Sections 8507-8530 of Chapter 162 of the South Carolina Code of 1932, Who are, or Claim to be, Engaged in Interstate Commerce as Well as Intrastate Operations Within the State of South Carolina, Respondents,

and

EARLE R. ELLERBE, J. C. CONEY, SAM C. BLEASE, J. H. NANCE, Thomas H. Tatum, J. A. Beamguard, and B. J. Pearman, as Members of and Constituting the Railroad Commission of South Carolina, Petitioners,

vs.

BLALOCK MOTOR EXPRESS, INC., Respondents

In the Original Jurisdiction

Demurrers Overruled and Petitions Granted

John M. Daniel, Attorney General, and Irvine F. Belser, both of Columbia, for petitioners.

B. Wofford Wait, of Tampa, Fla.; Nathans & Sinkler, of Charleston, and James H. Fowles, of Columbia, for respondents.

OPINION No. 13564—Filed January 27, 1933

STABLER, J.:

These two suits, instituted in the original jurisdiction of the Court, were heard together on argument and will be disposed of in one opinion. For the sake of convenience we will refer to them as the Hicklin Case and the Blalock Case. With the exception of one question applicable only to the latter, the questions involved in the two cases are identical.

It is alleged and admitted that the respondents come within Class "F" of motor vehicle carriers, defined in the amendatory act of April 7, 1930 (36 Stat. at Large, Page 1068), as consisting of persons, firms or corporations proposing to engage in the business known as contract hauling of freight or property, but not proposing to operate upon a regular schedule or over a regular route or to receive patronage along the route, and as such are required by the act to obtain a certificate to operate and to pay the [fol. 19] license fee therefor. It is further alleged that the respondents are now "carrying on their motor transportation business in the State of South Carolina over the public highways without any certificate and without paying any of the fees or taxes therefor, and in violation of the said laws hereinabove mentioned and of the orders and rules of the Railroad Commission issued thereunder".

The purpose of these actions, as set forth in the petitions, is to enforce the provisions of sections 8507 to 8530, inclusive, of chapter 162 of the Code of 1932 (acts of 1925, page 252; of 1928, page 1238; of 1930, pages 1068, 1100 and 1327; and of 1931, page 145), and to require the respondents to comply with these acts and the rules and orders of the Railroad Commission promulgated thereunder. The prayer of the petitions is that these acts be construed and enforced by this Court, that a mandatory order of injunction issue directing and requiring the respondents to comply therewith, and that they be enjoined from engaging in business as contract haulers without such compliance.

The respondents interposed demurrers to the petitions and also made returns and answers.

With regard to the demurrers, it is sufficient to say that the identical grounds made in these cases were considered by the Court in King vs. Ætna Insurance Company, et al.,

in its opinion filed November 23, 1932 (Westbrook's Advance Sheets, page 23). Chief Justice Blease, who wrote the opinion in that case, went into a full discussion of the questions made and disposed of them adversely to the contentions of the respondents there and here.

By their returns and answers the respondents challenge the constitutionality of the acts referred to (chapter 162 of the Code of 1932), section 66 of the general appropriation act of 1931, and section 34 of the general appropriation act of 1932, applicable to contract carriers, as to both State and Federal constitutions, contending that they are invalid because of certain exemptions made, requirements relating to cargo insurance, authority conferred on the Railroad Commission to regulate rates of contract carriers, the imposition of license fees based upon "carrying capacity", and the imposition of a tax upon the "gross receipts" of a carrier doing an interstate as well as an intrastate business.

In Stephenson vs. Binford, 77 L. Ed. 203, a very recent utterance of the United States Supreme Court as to the right and power of a State to regulate the use of its highways, the Court stated this broad general rule:

"It is well established law that the highways of the State are public property; that their primary and preferred use is for private purposes; and that their use for purposes of gain is special and extraordinary, which, generally at least, the Legislature may prohibit or condition as it sees fit"—citing cases.

Section 8507 of the Code defines "motor vehicle carrier", for the purposes of the act, as "every corporation or person * * * * operating * * * any motor propelled vehicle * * * used in the business of transporting persons or property for compensation over any improved public highway * * * as hereinafter defined, in this State".

I

Section 8508 of the Code, which contains certain exemptions, is as follows:

"No corporation or person, their lessees, trustees, or re- [fol. 20] ceivers, shall operate any motor-propelled vehicle as herein before defined for transportation of persons or

property for compensation on any improved public highways in this State, except in accordance with the provisions of sections 8507 to 8524, and such operation shall be subject to control, supervision and regulation by the commission in the manner provided by sections 8507 to 8524: Provided, however, That nothing in sections 8507 to 8524 contained shall apply to motor vehicles while used exclusively for transporting persons to and from schools, Sunday Schools, churches, or religious services of any kinds, or to or from picnics or upon special prearranged excursions, or to United States mail carriers operating star routes, while engaged solely in carrying mail, or to farmers or dairymen, hauling dairy or farm products; or lumber haulers engaged in transporting lumber and logs from the forest to the shipping points".

The respondents urge that the exemption of "farmers or dairymen, hauling dairy or farm products, or lumber haulers engaged in transporting lumber and logs from the forest to the shipping points", is discriminatory, and violates the fifth and fourteenth amendments to the Federal Constitution and section 5 of Article I of the State Constitution. The petitioners contend that the Railroad Commission has adopted regulations embodying the construction placed by it upon this provision, to the effect that the exemption applies only to farmers and dairymen who are engaged in hauling their own products and to farmers and dairymen who, occasionally, but not regularly, haul farm or dairy products for others, those who make a regular business of transporting farm and dairy products not being deemed for the purpose of the act to be farmers. They also contend that even if the construction placed upon the provision of the act by the Commission be rejected, there is a valid basis of discrimination in favor of farmers and dairymen hauling farm and dairy products in that they make only a limited use of the highways. The respondents answer that the construction given to the provision by the Commission cannot be sustained without the insertion of additional words—which, in effect, would be judicial legislation.

In support of their contention, counsel for respondents rely in the main upon the case of Smith vs. Cahoon, 283 U. S. 553; 51 S. Ct., 582; 75 L. Ed. 1264, in which the United

States Supreme Court declared unconstitutional a statute of the State of Florida enacted for the purpose of regulating auto transportation in that State. The act construed contained the following section:

"The term 'auto transportation company', when used in this Act, means every corporation or person, their lessees, trustees or receivers, owning, controlling, operating or managing any motor propelled vehicle not usually operated on or over rails, used in the business of transporting persons or property for compensation or as a common carrier over any public highway in this State between fixed termini or over a regular route: Provided, That the term 'auto transportation company' as used in this Act, shall not include corporations or persons engaged exclusively in the transportation of children to or from school, or any transportation company engaged exclusively in the transporting agricultural, horticultural, dairy or other farm products and fresh and Salt Fish and Oysters and Shrimp from the point of production to the assembling or shipping point enroute to primary market, or to motor vehicles used exclusively in transporting or delivering dairy products or any transportation company engaged in operating taxicabs, or hotel busses from a depot to a hotel in the same town or city.".

In support of their position, petitioners rely mainly upon the case of Baking Company vs. Woodring, 286 U. S. 352, 52 S. Ct. 595, 76 L. Ed. 816, a Kansas case, in which the United States Supreme Court declared an act of that State [fol. 21] relating to the regulation of motor traffic constitutional. Sections 1 and 2 of the Act are as follows (special attention is directed to section 2, by way of comparison with the above quoted provision of the Florida Act):

"Section 1. (a) The term 'motor vehicle' when used in this act means any automobile, automobile truck, trailer, motor bus, or any other self-propelled or motor-driven vehicle used upon any public highway of this state for the purpose of transporting persons or property. (b) The term 'public motor carrier of property' when used in this act shall mean any person engaged in the transportation by motor vehicle of property for hire as a common carrier having a fixed termini or route. (c) The term 'contract

motor carrier of property' when used in this act shall be construed to mean any person not a public motor carrier of property engaged in the transportation by motor vehicle of property for hire as a business. (d) The term 'private motor carrier of property' when used in this act shall be construed to mean any person engaged in the transportation by motor vehicle of property sold or to be sold by him in furtherance of any private commercial enterprise. (e) The term 'public motor carrier of passengers' when used in this act shall mean any person engaged in the transportation by motor vehicle of passengers or express for hire as a common carrier having a fixed termini or route. (f) The term 'contract motor carrier of passengers' when used in this act shall be construed to mean any person not a public motor carrier of passengers engaged in the transportation by motor vehicle of passengers or express for hire. (g) The term 'public highway' when used in this act shall mean every public street, road or highway or thoroughfare of any kind used by the public."

"Section 2. That this act shall not apply to motor carriers who shall operate wholly within any city or village of this state, or private motor carriers who operate within a radius of twenty-five miles beyond the corporate limits of such city, or any village, nor to the transportation of live stock and farm products to market by the owner thereof or supplies for his own use in his own motor vehicle; or to the transportation of children to and from school."

The Court in the Baking Company case, in distinguishing that case from the Cahoon case, had this to say:

"The third exemption applies to 'the transportation of livestock and farm products to market by the owner thereof or supplies for his own use in his own motor vehicle'. In Smith vs. Cahoon, supra, the state statute, which applied to all carriers for compensation over regular routes, including common carriers, exempted from its provisions 'any transportation company engaged exclusively in the transporting agricultural, horticultural, dairy or other farm products and fresh and Salt Fish and Oysters and Shrimp from the point of production to the assembling or shipping point enroute to primary market, or to motor vehicles used exclusively in transporting or delivering dairy products'.

The stated distinction was thus established between carriers, and between private carriers, notwithstanding the fact that they were 'alike engaged in transporting property for compensation over public highways between fixed termini or over a regular route'. The Court was unable to find any justification for this discrimination between carriers in the same business, that is, 'between those who carry for hire farm products, or milk or butter, or fish or oysters, and those who carry for hire bread or sugar, or tea or coffee, or groceries in general or other useful commodities'.

[fol. 22] The distinction in the instant case is of a different sort. The statute does not attempt to impose any arbitrary discrimination between carriers who transport property for hire, or compensation, with respect to the class of products they carry. The exemption runs only to one who is carrying his own livestock and farm products to market or supplies for his own use in his own motor vehicle. In sustaining the exemption, the District Court referred to the factual basis for the distinction. 'The Legislature knew', said the Court, 'that as a matter of fact farm products are transported to town by the farmer, or by a non-exempt 'contract carrier' employed by him. The Legislature knew that as a matter of fact the use of the highways for the transportation of farm products by the owner is casual and infrequent and incidental; farmers use the highways to transport their products to market ordinarily but a few times a year. The Legislature rightly concluded that the use of the highways for carrying home his groceries in his own automobile is adequately compensated by the general tax imposed on all 'motor vehicles'. 55 F. (2d) at page 352. And the Court properly excluded from consideration mere hypothetical and fanciful illustrations of possible discriminations which had no basis in the actual experience to which the statute was addressed. The court found a practical difference between the case of the appellants 'who operate fleets of trucks in the conduct of their business and who use the highways daily in the delivery of their products to their customers', and that of 'a farmer who hauls his wheat or livestock to town once or twice a year'. The Legislature in making its classification was entitled to consider frequency and character of use and to adapt its regulations to the classes of operations, which by

reason of their habitual and constant use of the highways brought about the conditions making regulation imperative and created the necessity for the imposition of a tax for maintainance and reconstruction. As the Court said in Alward v. Johnson, 282 U. S. 509, 513, 514, 51 S. Ct. 273, 274, 75 L. Ed. 496, 75 A. L. R. 9: 'The distinction between property employed in conducting a business which requires constant and unusual use of the highways and property not so employed is plain enough.' See, also, Bekins Van Lines v. Riley, 280 U. S. 80, 82, 50 S. Ct. 64, 74 L. Ed. 178; Carley & Hamilton v. Snook, 281 U. S. 66, 73, 50 S. Ct. 204, 74 L. Ed. 704, 68 A. L. R. 194."

The petitioners also rely upon the case of Schwartzman Service vs. Stahl, 60 F. (2 Ed.) 1034. This decision was rendered by a three-judge Court, and, while not controlling as an authority, is able and persuasive. The statute construed in that case contains certain exemptions from the obligations and duties imposed by the act, among these being one that the act should not apply to "motor vehicles used exclusively in transporting farm and dairy products from the farm or dairy to warehouse, creamery or other original storage or market". This exemption was held to be reasonable and not arbitrary, and not to render the act unconstitutional. In its opinion the Court made the following pertinent observations:

"It must be acknowledged that the state has the power to regulate and control the movements of motor vehicles over its highways. This it may do in the interest of public convenience and safety and for the protection of the highways. Provisions of this character have been uniformly sustained. Buck v. Kuykendall, 267 U. S. 307, loc. cit. 314, 45 S. Ct. 324, 69 L. Ed. 623, 38 A. L. R. 286; Stephenson v. Binford, et al. (D. C.), 53 F. (2d) 509.

Moreover, while 'a citizen may have, under the Fourteenth Amendment, the right to travel and transport his property upon them by auto vehicle', yet 'he has no right to make the highways his place of business by using them as a common carrier for hire. Such use is a privilege which [fol. 23] may be granted or withheld by the state in its discretion, without violating either the due process clause or the equal protection clause'. Packard v. Banton, 264 U. S. 140, loc. cit. 144, 44 S. Ct. 257, 68 L. Ed. 596.

The highways belong to the state. It may make provisions appropriate for securing the safety and convenience of the public in the use of them. Kane v. State of New Jersey, 242 U. S. 160, 37 S. Ct. 30, 61 L. Ed. 222.

Assuming, therefore, the power and right of the state to regulate and supervise its highways, such right cannot be hampered or restricted within narrow bounds. On the contrary, to the end that such right might be fully enjoyed and exercised, there is a constant recognition of the principle that the state 'has a broad discretion in classification in the exercise of its power of regulation'. Smith v. Cahoon, 283 U. S. 553, loc. cit. 566, 51 S. Ct. 582, 587, 75 L. Ed. 1264. Upon such classification, no person can interpose an objection, save only in those cases where the classification or discrimination is entirely arbitrary".

See also Sproles vs. Binford, 286 U. S. 374, 52 S. Ct. 581, 76 L. Ed. 827, in which the United States Supreme Court upheld a discrimination in favor of "implements of husbandry", construed to mean tractors, plows, etc., the use of the highways for this sort of transportation, as was pointed out, being temporary only. It also upheld an exemption in favor of vehicles transporting "property from point of origin to the nearest practicable common carrier receiving or loading point or from a common carrier unloading point by way of shortest practicable route to destination". The Court distinguished the case from Smith vs. Cahoon and thus stated the basis of its decision: "But the Legislature in making its classification was entitled to consider frequency and character of use and to adapt its regulations to the classes of operation, which by reason of their extensive as well as constant use of the highways brought about the conditions making the regulations necessary. Continental Baking Company vs. Woodring, supra".

The petitioners contend that the Cahoon case may be validly distinguished in the cases at bar as it was in the cases cited, and in this we agree. In the first place, in the Cahoon case, the Court was dealing with a criminal prosecution, which point it stressed, saying: "It should be observed that this is not an action in equity where the enforcement of a statute awaits the final determination of the Court as to validity and scope". The cases before us are suits in equity, in which this Court is asked to construe the acts in question. Also, in that case, the discrimination

was in favor of "any transportation company" engaged in hauling the class of products therein mentioned, while in the cases at bar the discrimination is in favor of farm and dairy products only when hauled by farmers and dairymen, and in favor of lumber haulers engaged in transporting lumber and logs from the forest to the shipping points. In other words, there is a double element involved in the classification in this case, the class of persons and the class of products, while there was only one element of classification involved in the Cahoon case, namely, the class of products.

It must be conceded, as has been held in German Alliance Insurance Company vs. Kansas, 233 U. S. 389, that even though an exemption operates as a discrimination, it is not necessarily invalid; and, also, as is generally held, that a classification or discrimination should be allowed to stand unless it is entirely arbitrary. Unquestionably, the use by farmers and dairymen for the transportation of farm and dairy products is seasonal and involves only a moderate use of the highways; and the exemption here is further limited by the fact that it can apply only to one whose principal business is that of a farmer or dairyman and not [fol. 24] to one merely incidentally engaged in farming or dairying. As pointed out in the Woodring case, there is a practical difference between such use of the highways and that made by the respondents in this case, "who operate fleets of trucks in the conduct of their business and who use the highways daily in the delivery of their products to their customers", the Court holding, as we have seen, that the Legislature in making its classification was entitled to consider frequency and character of use, etc. In addition, there is this material consideration, that farming and dairying lie at the foundation of our economic structure and are essential to the public welfare.

We think the respondents have failed to sustain the burden cast upon them of showing beyond a reasonable doubt that the exemption in question renders the act unconstitutional and invalid.

It will be observed that this conclusion has been reached independently of the construction placed by the Railroad Commission upon the contested provision of the Act. We think that this construction is, in part, unsound. One hauling his own products in his own motor vehicle does not

come within the purview of the act and no provision for his exemption is necessary. The act applies only to those who are carriers for compensation, and the exemption can refer only to farmers and dairymen hauling farm and dairy products for compensation. The same may be said with regard to those hauling lumber and logs from the forest to the shipping points. See Sproles vs. Binford, supra.

II

The respondents also contend that the acts in question are invalid "because the requirements of section 8511 that contract carriers must obtain and carry cargo insurance violates the fifth amendment to the Constitution of the United States".

Section 8511 provides:

"The commission shall, in the granting of a certificate, require the applicant to procure and file with said commission liability and property damage insurance, or surety bond with some casualty or surety company authorized to do business in this state, on such motor vehicle or vehicles to be used in the service aforesaid, in such amount as the commission may determine, insuring or indemnifying passengers or cargo and the public receiving personal injury by reason of any act of negligence, and for damage to property of any person other than the assured; such policy or bond to contain such conditions, provisions, and limitations as the commission may prescribe and the same shall be kept in full force and effect, and failure to do so shall be cause for the revocation of such certificate".

Respondents argue that one of the principal differences between a common carrier and a private or contract carrier is, that the common carrier is an insurer, while the private or contract carrier is not; and that the Legislature cannot compel private carriers to become or to assume the duties and liabilities of common carriers. They contend that in our statute the Legislature attempted to put both classes of carriers upon an identical footing and subject them to the same obligations, which was beyond their power to do, citing in support of their contention Michigan Public Utilities Commission vs. Duke, 266 U. S. 570, 45 S. Ct. 191, 69 L. Ed. 445, 36 A. L. R. 1105, where it is said

that: "It is a burden upon interstate commerce to impose on plaintiff the onerous duties and strict liability of common carrier, and the obligation of furnishing such indemnity bond to cover the automobile bodies hauled under his contracts as conditions precedent to his right to continue to carry them in interstate commerce. * * *. Clearly, these requirements have no relation to public safety or order and the use of motor vehicles upon the highways, or [fol. 25] to the collection of compensation for the use of the highways. The police power does not extend so far". But, as pointed out in the Stephenson case, supra, the State statute construed in the Duke case expressly provided that all persons engaged in the transportation of persons or property for hire by motor vehicle upon the public highways of the State should be common carriers.

Similarly, as also pointed out in the Stephenson case, Front Trucking Company vs. R. R. Commission, 271 U. S. 583, involved a state statute which had been construed by the California Supreme Court as requiring a private contract carrier to dedicate his property to the business of public transportation and to subject himself to all the duties and burdens imposed by the act upon common carriers; and the United States Supreme Court, in accordance with the settled rule, accepted such construction as binding upon it.

Our statute, however, like that construed in the Stephenson case, expressly recognizes the distinction between common carriers and private contract carriers; and from an examination of the entire act it is clear that the Legislature did not intend to put common carriers and private contract carriers on the same footing with regard to the matters here complained of. We think, and so hold, that in the case of private carriers, or contract carriers, the provisions of section 8511 extend no further than to require such carriers to execute an indemnity bond, as the commission may prescribe under the provisions of the act, for the protection of the public receiving injury, either in person or in property, by reason of any act of negligence of such private or contract carriers. We do not think it was the intent of the Legislature, in the passage of the act, to require contract carriers to obtain and carry cargo insurance, and we construe the act as not imposing upon them such requirement.

III

The respondents further contend that the act is invalid "because the provisions of section 8516 vesting in the Railroad Commission the power and authority, and imposing upon it the duty, of regulating the rates of contract carriers is likewise in violation of said constitutional provisions, being an unwarrantable interference with the right of private contract".

Section 8516 reads as follows:

"The commission is hereby vested with power and authority and it shall be their duty to supervise and regulate every motor carrier in this State; to fix or approve the rates, fares, charges, classification and rules and regulations pertaining thereto, of each such motor carrier: Provided, however, That the rate now obtaining by the respective motor carriers shall remain in effect until such time, when pursuant to complaint and proper hearing, the commission shall have determined that said rate or rates are unreasonable: Provided, That the said commission shall fix as to class certificate C a maximum rate only."

As it is conceded that the Railroad Commission, which is vested with the power and authority to fix and approve rates, etc., as provided by section 8516, has never, since the enactment of the law, exercised its power, if any it has under the act, to supervise and regulate rates of contract carriers, the respondents here have no ground for complaint. See Stephenson vs. Binford, supra.

[fol. 26] IV

It is also contended that the act is invalid "because the license fees required of contract carriers under section 8512 are based solely upon 'carrying capacity', and, hence, insofar as contract carriers engaged in interstate commerce are concerned, are void because they are not compensatory, and therefore violate article I, section 8, of the constitution of the United States, and the fifth and fourteenth amendments thereto".

With regard to holders of certificate F, to which class the respondents herein belong, section 8512 provides:

"For vehicles of carrying capacity of not over one and one-half tons, thirty ($30.00) dollars; for vehicles of carrying capacity of over one and one-half tons and not over two tons, sixty ($60.00) dollars; for vehicles of carrying capacity of over two tons and not over three tons, one hundred twenty ($120.00) dollars; for vehicles of carrying capacity of over three tons and not over four tons, two hundred ($200.00) dollars; for vehicles of carrying capacity of over four tons and not over five tons, four hundred ($400.00) dollars; for vehicles equipped fully with pneumatic tires: for vehicles equipped fully or partially with solid tires these fees shall be doubled".

In the Duke case, supra, the United States Supreme Court said:

"A state which, at its own expense, furnishes special facilities for the use of those engaged in intrastate and interstate commerce may exact compensation therefor, and if the charges are reasonable and uniform, they constitute no burden on interstate commerce. Hendrick v. Maryland, 235 U. S. 610, 622, 59 L. Ed. 385, 390, 35 Sup. Ct. Rep. 140; Kane v. New Jersey, 242 U. S. 160, 167, 71 L. ed. 222, 226, 37 Sup. Ct. Rep. 30. Such regulations are deemed to be reasonable and to affect interstate commerce only incidentally and indirectly".

We have made a careful examination of the authorities with reference to this particular contention and think it is without merit. Such fees are collected, as provided for by section 8517, for the purpose of maintaining the public highways over which such motor vehicles shall operate, as compensation for their use. Further, they are reasonable as to amount and tend to contribute to the protection of the highways. We do not think that the provision of the act here complained of constitutes an undue burden on interstate commerce.

V

The respondents in the Blalock case also raise a question as to the tax imposed on all carriers for hire under section 66 of the general appropriation act of 1931, which they attack as being violative of the interstate commerce clause of the United States Constitution, for the following reasons:

"(a) That said tax, imposed by the terms of said Act upon the 'gross receipts' of such carriers, was a tax upon receipts from *interstate* as well as *intrastate* business, constituted a burden on interstate commerce in contravention of Article 1, Section 8, of the Constitution of the United States, and (b) was not in lieu of all other taxes, in violation of said last named provision and the Fourteenth Amendment".

It is well settled that the State may impose taxes upon the intrastate operations of a motor carrier though such [fol. 27] motor carrier is also engaged in interstate operations. Interstate Busses Corporation vs. Blodgett, 276 U. S. 245, 48 S. Ct. 230, 72 L. Ed. 551. It was also there held that in a case of this sort the burden is upon the complainant to show that in actual practice the tax operates to deprive him of his constitutional rights, because the aggregate charge bears no reasonable relation to the privilege granted. Also, it was said by the Court in the Continental Baking Company case, supra, that the Court should exclude "from consideration more hypothetical and fanciful illustrations of possible discriminations which had no basis in the actual experience to which the statute was addressed". In the case at bar the evidence is clear that the Railroad Commission has not at any time undertaken to construe the acts in question as imposing any taxes upon interstate operations, and until this is done, respondent has no cause for complaint. See Stephenson vs. Binford, supra.

The judgment of this Court is:

First. That the demurrers interposed by the respondents be, and the same are hereby, overruled.

Second. That the Acts in question are construed as herein indicated, and that the taxes and license fees required of the respondents by the petitioners thereunder are lawful and due, and that the petitioners be authorized to proceed to the collection thereof.

Third. That the petitioners have the right to apply to this Court hereafter for the issuance of such order, or orders, writ or writs, as may be necessary to carry into effect the conclusions and judgment of this Court, and upon their application therefor, at the proper time, that the order

restraining the petitioners from proceeding to enforce the Acts of the General Assembly, referred to in these causes, be dissolved.

Blease, C. J.; Carter and Bonham, JJ., and W. C. Cothran, A. A. J., concur.

[fol. 28] IN SUPREME COURT OF THE UNITED STATES.

[Title omitted]

PETITION FOR APPEAL

To Honorable Eugene S. Blease, Chief Justice of the Supreme Court of South Carolina:

Considering themselves aggrieved by the final decision of the Supreme Court of the State of South Carolina in the above entitled causes (which were consolidated and heard together), the respondents therein, M. D. Hicklin and Blalock Motor Express, Inc., a corporation of the State of South Carolina, hereby pray that an appeal be allowed to the Supreme Court of the United States herein to the end that the decree of the Supreme Court of South Carolina may be there reviewed and considered and justice done these appellants, for the reasons stated in the assignment [fol. 29] of errors accompanying and hereby made a part of this petition; and desiring that the order restraining the petitioners from proceeding to enforce the acts of the General Assembly, referred to in these causes, be continued pending this appeal, and the right accorded to petitioners in said judgment and decree to apply to the Supreme Court of South Carolina for the issuance of such order, or orders, writ, or writs, as may be necessary to carry into effect the conclusions and judgment of said court, be suspended during the pendency of this appeal, the said respondents do hereby further pray this court, being the court so authorized, to exercise its discretion in the granting of a supersedeas, to continue the order restraining the petitioners from proceeding to enforce the said acts of the General Assembly in full force and effect until the appeal of these appellants may be heard and determined in the Supreme Court of the United States; and these respondents further pray that a proper order be made fixing the amount

of bond required of them herein on such appeal, and providing that upon the filing and approval of such bond a supersedeas be issued by this Honorable Court.

Assignment of Errors

The said respondents (appellants herein) assign the following errors in the record and judgment of said Supreme Court of South Carolina, to wit: that said Supreme Court erred in its said decision as follows:

1. In failing to hold that the proviso to Section 2 of Act No. 170 of 1925, Stats. at L., 252, as amended by Acts of 1928, page 1238; Acts of 1930, pages 1068, 1100 and 1327; and Acts of 1931, page 145, appearing, in its amended form, as Section 8508 of the Code of Laws of South Carolina, 1932, Vol. III, page 954, exempting, inter alia, "farmers or dairymen, hauling dairy or farm products, or lumber haulers engaged in transporting lumber or logs from the forest to shipping points" from the requirements of said Act No. 170 of 1925, as amended, supra (which said Act, as amended, now appears as Chapter 162 of said Civil Code, Sections 8507-8524), is discriminatory, and in violation of the Fifth Amendment and of Article I of the Fourteenth Amendment [fol. 30] to the Constitution of the United States.

2. In failing to hold that the provisions of Section 8511 of Code of Laws of S. C., 1932, relative to the requirement that all motor vehicle carriers for compensation should "procure and file with said commission liability and property daamge insurance, or surety bond with some casualty or surety company authorized to do business in this State, on such motor vehicle or vehicles to be used in the service aforesaid, in such amount as the commission may determine, insuring or indemnifying passengers or cargo and the public receiving personal injury by reason of any act of negligence, and for damage to property of any person other than the assured", etc., were applicable to contract carriers, thereby imposing on private contract carriers the onerous duties and strict liabilities of common carriers, and, therefore, in conflict with the Fifth and Fourteenth Amendments to the Constitution of the United States, and, insofar as contract carriers engaged in interstate commerce are concerned, in contravention of Section 8 of Article 1 of said Constitution.

3. In failing to hold that the requirement of Section 8512 of Code of Laws of S. C., 1932, for the payment by contract carriers of license fees based solely upon carrying capacity, insofar as such carriers engaged in interstate commerce are concerned, is void because not compensatory, and, therefore, in violation of said constitutional provisions.

4. In failing to hold that the tax imposed on contract motor carriers for hire by Section 66 of the General Appropriation Act of 1931 was void as to the appellant, Blalock Motor Express, Inc., inasmuch as the said appellant was not "subject to regulation by the Railroad Commission" for the reasons stated in the three preceding assignments of error, and for the further reasons (a) that said tax, imposed by the terms of said Act upon the "gross receipts" of such carriers, was, as to said appellant, a tax upon receipts from its interstate as well as its intrastate business, and constituted a burden on interstate commerce in contravention of Section 8 of Article I of the Constitution [fols. 31–38] of the United States, and (b) was in violation of said provision and of Section 1 of the Fourteenth Amendment to the federal Constitution in that said tax was not in lieu of all other taxes.

5. In failing to hold that the provisions of Section 8516 of Code of Laws of S. C., 1932, vesting in the Railroad Commission the power and authority, and imposing upon it the duty, to regulate the rates of contract carriers, were in violation of the Fifth and Fourteenth Amendments to the Federal Constitution.

6. In failing to hold that the said several statutes deprived appellants of their property without due process of law, and denied them the equal protection of the law.

7. In failing to render judgment in favor of said respondents.

8. In holding the said several statutes to be constitutional acts.

Prayer for Reversal

For which errors the respondents-appellants, M. D. Hicklin and Blalock Motor Express, Inc., pray that the said order, decree and judgment of the Supreme Court of South Carolina, dated Jan. 27, 1933, in the above entitled causes,

be reviewed by the Supreme Court of the United States, and reversed, and that a decree be entered in favor of appellants, and for costs.

B. Wofford Wait, Nathans & Sinkler, Attorneys for Respondents-Appellants.

[fol. 39] In Supreme Court of the United States

[Title omitted]

Order Allowing Appeal—Filed April 26, 1933

This matter comes before the undersigned, Chief Justice of the South Carolina Supreme Court, upon petition and application of M. D. Hicklin, individually, and as a representative of Class "F" Carriers within the provisions of Sections 8507-8530 of Chapter 162 of the South Carolina Code of 1932, and of Blalock Motor Express, Inc. praying for an order herein allowing an appeal to the Supreme Court of the United States from the Supreme Court of the [fol. 40] State of South Carolina and for a supersedeas of the decision of the said Court pending such appeal.

It appears from the said petition and from the record of the above entitled causes, which were consolidated and heard together, that there was drawn in question the validity of Chapter 162 of the South Carolina Code of Laws of 1932, and of the general appropriation act of 1931 (36 Statutes at Large, page 453), and that the decision of the Supreme Court of South Carolina was in favor of the validity of such statutes, and hence this is a proper case for the allowance of an appeal.

The said applicants also asked this Court to grant a supersedeas staying the enforcement of the decision of the Supreme Court of South Carolina and of the statutes therein involved pending the appeal to the United States Supreme Court, and suggest that the amount of the appeal bond should be in an amount only sufficient to cover the taxes and license fees due to be paid by M. D. Hicklin, individually, and by the Blalock Motor Express, Inc. on its own behalf. However, the above entitled suit against M. D. Hicklin was a class suit and was brought against him in-

dividually and as a representative of all the Class "F" Carriers, after the said M. D. Hicklin in the same representative capacity had previously instituted a suit in the United States District Court for the Eastern District of South Carolina to obtain an injunction against the enforcement of the said statutes, which suit is now pending in the said Court. The suit in the State Supreme Court was brought and tried against the said M. D. Hicklin both individually and as a representative of all the Carriers within the said Class, and the above two suits were by consent of all parties consolidated and heard together by the State Supreme Court. It therefore appears to this Court that no supersedeas in this case should be granted unless the said applicants will furnish a supersedeas bond in an amount sufficient to cover the total amount of the license fees and taxes which the State of South Carolina would be [fol. 41] prevented from collecting by reason of the supersedeas. It appears to this Court from the evidence submitted that the amount of such fees and licenses for the years 1932 and 1933 would not be less than $85,000.00. Hence no supersedeas should be granted unless the said applicants will furnish a good and sufficient bond in the said amount of $85,000.00.

An appeal, however, will be allowed, without a supersedeas, upon the said applicants furnishing a suitable cost bond in the sum of $500.00.

Now, therefore, for the foregoing reasons, it is hereby ordered by the undersigned, Chief Justice of the Supreme Court of the State of South Carolina, that the said appeal be and the same is hereby allowed; provided that the said appellants, M. D. Hicklin, individually, and as representative of the Class "F" Carriers, and the Blalock Motor Express, Inc. do each execute to the respondents (petitioners in this Court) within ten days from the date hereof, their respective cost bonds, with surety to be approved by the undersigned, in the sum of $500.00 each, conditioned to prosecute the appeal and as security for costs as provided by law.

It is further ordered that the decision of this Court shall not be stayed unless the said appellants, M. D. Hicklin, individually and as a representative of Class "F" Carriers, and Blalock Motor Express, Inc. shall execute their supersedeas bond to the respondents (petitioners in this Court)

within twenty days from the date hereof in the sum of $85,000.00, conditioned that the said appellants shall answer all damages and costs if they fail to make their plea good according to law to be approved by the undersigned; but that upon the filing of such bond, but not otherwise, an order of supersedeas do issue from this Court, that the [fol. 42] original restraining order be continued in full force and effect during the pendency of this appeal.

It is further ordered that the Clerk of this Court, within thirty days from this date, do make and transmit to the Clerk of the United States Supreme Court, under his hand and seal of this Court, a transcript of the record herein containing a true copy of all material parts of the record herein, which shall be designated by præcipe filed with him by any of the parties hereto.

Done this 24th day of April, 1933.

(Signed) Eugene S. Blease, Chief Justice of the Supreme Court of South Carolina.

Copy of the foregoing order allowing appeal received this the 26 day of April, 1933.

(Signed) J. B. Westbrook, Clerk of the Supreme Court of South Carolina.

[File endorsement omitted.]

[fol. 43] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

WAIVER OF ISSUANCE OF CITATION AND ACKNOWLEDGMENT OF SERVICE

We, John M. Daniel, Attorney General of the State of South Carolina, and Irvine F. Belser, Special Counsel for the Railroad Commission of South Carolina, attorneys of record for the above named Petitioners (Appellees herein), do hereby acknowledge due and timely service of the Petition for Appeal, Assignments of Error, Statement as to Jurisdiction of the Court, and Order allowing Appeal, in the above entitled cause, and receipt of copies thereof, and

do hereby waive the issuance of Citation therein, this 22nd day of May, 1933.

—— ——, Attorney General of South Carolina.
—— ——, Special Counsel for Railroad Commission of South Carolina.

To J. C. Coney et al., as members of and constituting the Railroad Commission of South Carolina, appellees, and to Hon. John M. Daniel, Attorney General of South Carolina, and Hon. Irvine F. Belser, special counsel for Railroad Commission of South Carolina, attorneys of record for said appellees:

Your attention is directed to the following provisions of Rule 12, paragraph 3:

"Within 15 days after such service the appellee may file with the clerk of the court possessed of the record, and serve upon the appellant, a typewritten statement disclosing any matter making against the jurisdiction of this court asserted by the appellant. There may be included in, [fol. 44] or filed with, such opposing statement, a motion by appellees to dismiss or affirm. Where such a motion is made, it may be opposed as provided in Rule 7, paragraph 3."

—— ——, Counsel for Appellant.

[fol. 45] IN SUPREME COURT OF SOUTH CAROLINA

[Title omitted]

ORDER DISSOLVING INJUNCTION, ETC.

This matter came before the Chief Justice of this Court on or about the 24th day of April, 1933, upon application of the defendants to have an appeal to the United States Supreme Court allowed, and a cost bond and supersedeas bond fixed therein as provided by law.

For the reasons stated in his said order dated the 24th day of April, 1933, the Chief Justice of this Court fixed the appeal bond at Five Hundred ($500.00) Dollars and the supersedeas bond at Eighty-five Thousand ($85,000.00) Dollars, the amount of the latter bond being intended to provide security for the payment of the license fees and

taxes by the Class "F" Carriers affected by the said suit.

It now appears to the Court that the said defendant, M. D. Hicklin, individually and as a representative of Class "F" Carriers, has furnished the Five Hundred ($500.00) Dollar bond herein provided for, but there is no intention on the part of the defendant-appellant either individually or as a representative of Class "F" Carriers to put up the Eighty-five Thousand ($85,000.00) Dollar supersedeas bond provided for by the said order.

Under these circumstances and in view of the pendency of the suit in this Court and the appeal to the United States Supreme Court, and in view of the pendency of the suit brought by M. D. Hicklin, individually, and as a representative of Class "F" Carriers, in the United States District Court against the petitioners in this case, it appears to the Court that a method should be provided whereby the State of South Carolina may be in position to collect the taxes and license fees due by the said Class "F" Carriers pending the said appeal to the United States Supreme Court, but that any members of the said Class "F" Carriers operating in the State of South Carolina should be able to participate in the appeal to the United States Supreme Court by putting up the amount of the license fees and taxes which they would otherwise be required to pay for operating over the State Highways. There appears to be no provision in the statutory law of the State of South Carolina whereby such Class "F" Carriers would have the right to pay the amount of such taxes and fees under protest with the right to recover them back.

For the foregoing reasons, and upon the Court's own motion, and by and with the consent of the counsel for the petitioners in the above case and counsel for the defendant,

It is hereby ordered and adjudged:

1. That the injunction heretofore issued by this Court restraining the enforcement of the statutes involved in this case be and the same is hereby dissolved, and that the peti- [fol. 46] tioners have leave to collect the license fees and taxes from the Class "F" Carriers as provided by law, or to secure a further order from this Court enjoining and restraining any of the said Class "F" Carriers from operating over the highways of this State, with the right to have any violation of such order punished by contempt or otherwise as provided by law, after having copy of the said order

duly served upon any of the Class "F" Carriers; provided, however, that if any such Class "F", or contract, carrier, may desire to participate in the relief which may be afforded should the said M. D. Hicklin prevail in his appeal, and make himself a party thereto, he may pay such license fees and taxes to the State Treasurer, in escrow, to be held by said Treasurer abiding the result of said appeal, then to be paid over by the said Treasurer to the Railroad Commission, or returned to such parties, as the case may be without interest; provided, however, that the said Treasurer shall not be authorized to accept any such payments until any such carrier shall submit to him a statement from the Railroad Commission as to the amount due by any such carrier by way of such license fees and taxes, and a statement from counsel of record for the said M. D. Hicklin that such carrier has contributed ratably to the costs of said appeal.

Eugene S. Blease, Chief Justice.

We Concur:

John G. Stabler, M. L. Bonham.

13 May, 1933.

[fol. 47] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 48] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND STIPULATION AS TO PRINTING RECORD—Filed May 24, 1933

Comes now the appellant in above entitled cause and states that the points upon which he intends to rely in this Court are as follows:

Point 1. The statute of the State of South Carolina, to wit: Act No. 170 of 1925, entitled "An Act Providing for the Regulation, Supervision, and Control of Persons, Firms, Corporations, and Associations Owning, Controlling, Operating or Managing Motor Vehicles Used in the Business of Transporting Persons of Property for Compensation on the Improved Public Highways of the State, Which Are, or May Hereafter be Declared to be Parts of

the State Highway System, or Any of the County Highway Systems, or the Streets of Any City or Town, and Prescribing and Imposing License Fees and Providing for the Disposition of the Revenue Raised by the Same", approved April 8, 1925 (XXXIV Statutes at Large, 252), as amended by Act No. 663 of 1928, approved March 9, 1928 (XXXV Statutes at Large, 1238), Act No. 220 of 1929, approved March 4, 1929 (XXXVI Statutes at Large, 247), Act. No. 716 of 1930, approved March 7, 1930 (XXXVI Statutes at Large, 1100), Act No. 604 of 1930, approved April 7, 1930 (XXXVI Statutes at Large, 1068), Act No. 792 of 1930, approved April 7, 1930 (XXXVI Statutes at Large, 1327), and Act No. 109 of 1931, approved March 18, 1931 (XXXVII Statutes at Large, 144), now appearing, as so amended, as Chapter 162 (Sections 8507-8524) of the Code of Laws of South Carolina, 1932, Vol. III, 954, is unconstitutional and repugnant to Section 1 of the Four-[fol. 49] teenth Amendment to the Constitution of the United States, in that it deprives the appellant of his liberty and property without due process of law.

Point 2. The aforesaid Act of the State of South Carolina is unconstitutional and repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it denies the appellant the equal protection of the laws.

Point 3. The aforesaid Act of the State of South Carolina is unconstitutional and repugnant to Section 8 of Article 1 of the Constitution of the United States, in that it imposes an undue burden on interstate commerce.

Point 4. That Section 66 of Act No. 291 of 1931, approved May 9, 1931 (XXXVII Statutes at Large, 397—see page 454) is unconstitutional and repugnant to Section 1 of the Fourteenth Amendment to, and Section 8 of Article 1 of, the Constitution of the United States, (a) in that said appellant was not "subject to regulation by the Railroad Commission" for the reasons stated in Points 1 and 2, (b) in that the tax imposed by the terms of said Act upon the "gross receipts" was a tax upon his receipts from interstate as well as intrastate business, and (c) in that said tax was not in lieu of all other taxes.

Point 5. That Section 34 of Act No. 897 of 1932, approved April 4, 1932 (XXXVII Statutes at Large, 1567—

see page 1606) is unconstitutional and repugnant to the constitutional provisions referred to in Point 4 for the reasons stated under (a) and (c).

Point 6. The Supreme Court of the State of South Carolina erred in ruling that the aforesaid statutes of South Carolina were valid and constitutional regulations.

B. Wofford Wait, Counsel for Appellant.

We, John M. Daniel, Attorney General of the State of South Carolina, and Irvine F. Belser, Special Counsel of the Railroad Commission of South Carolina, attorneys of record for the Appellees, hereby acknowledge due and timely service of the above statement of points to be relied upon, and agree that this statement, together with the parts [fols. 50–53] of the record mentioned and referred to in the Stipulation of counsel, dated May 22, 1933, constitute all parts of the record material and necessary to the consideration of the case, and hereby expressly waive all right to file a counterdesignation of parts of the record to be printed.

John M. Daniel, Attorney General of South Carolina; Irvine F. Belser, Special Counsel for Railroad Commission of South Carolina, Counsel for Appellees.

Dated at Columbia, S. C., May 23, 1933.

[fol. 54] STIPULATION OF COUNSEL AS TO CONTENTS OF RECORD

It is hereby stipulated and agreed by and between counsel for the appellant and counsel for the appellees in above entitled cause that only the following parts of the record, as filed in this court, need be printed by the Clerk for the hearing of this case, and that the same may be printed under one cover:

1. Order of Mr. Justice John G. Stabler, dated August, 1932.
2. Petition, dated August 3, 1932.
3. Return and Answer, dated August 22, 1932.
4. Reply, dated October 5, 1932.

5. Affidavit of W. W. Goodman, dated Dec. 16, 1931.
6. Decree of Supreme Court of South Carolina, filed Jan. 27, 1933.
7. Petition for Appeal.
8. Assignments of Error.
9. Statement as to Jurisdiction of Court.
10. Order Allowing Appeal.
10½. Order as to Bond, dated May 13, 1933.
11. Waiver of Issuance of Citation and Acknowledgment of Service, dated May 22, 1933.
12. This Stipulation.

B. Wofford Wait, Counsel for Appellant. John M. [fols. 55 & 56] Daniel, Irvine F. Belser, Counsel for Appellees.

Columbia, S. C., May 22, 1933.

[fol. 57] [File endorsement omitted.]

Endorsed on cover: File No. 37,696. South Carolina Supreme Court. Term No. 94. M. D. Hicklin, individually, etc., and Blalock Motor Express, Inc., appellants, vs. J. C. Coney, Earle R. Ellerbe, Sam C. Blease, et al., etc. Filed May 24, 1933. File No. 94, O. T., 1933.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 94

M. D. HICKLIN, INDIVIDUALLY, ETC., AND BLALOCK MOTOR EXPRESS, INC., APPELLANTS,

vs.

J. C. CONEY, EARLE R. ELLERBE, SAM C. BLEASE, ET AL., ETC.

APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

STATEMENT AS TO JURISDICTION OF COURT.

These are cases (consolidated and heard together) in which the validity of two statutes of the State of South Carolina, to wit: Act No. 170 of 1925, XXXIV Statutes at Large, page 252, as amended by Act of 1928, XXXV Statutes at Large, page 1238, Acts of 1930, XXXVI Statutes at Large, pages 1068, 1100 and

1327, and Act of 1931, XXXVII Statutes at Large, page 145, now appearing, as so amended, as Chapter 162, Sections 8507 to 8524, both inclusive, of the Code of Laws of South Carolina, 1932, Vol. III, pages 954-962, and Section 66 of the general appropriation act of 1931, XXXVII Statutes at Large, page 453, are drawn in question, upon the grounds that said statutes are repugnant to Section 8 of Article I of the Constitution of the United States and to the Fifth and Fourteenth Amendments thereto. The final decision of the Supreme Court of South Carolina, the court of last resort in all causes in said State in which a decision could be had, is in favor of the validity of said statutes. Therefore, in accordance with the rules of the Supreme Court of the United States (Rule 46, Paragraph 2, immediately following 28 U. S. C. A., Sec. 354), the respondents herein respectfully show that these cases are ones in which under the legislation in force when the Act of January 31, 1928 (45 Stat. L. 54), was passed, to wit, under Sec. 237 (*a*) of the Judicial Code (28 U. S. C. A., Sec. 344) a review could be had in the Supreme Court of the United States on writ of error as a matter of right.

The opinion of the said Supreme Court of South Carolina, upholding the validity of the statutes in question, was filed on January 27, 1933, and has not yet been officially reported, but is unofficially reported in the Advance Sheets of the South Eastern Reporter, Vol. 167—No. 8, at page 674, as *State ex rel. Coney et al.* v. *Hicklin*, and *Ellerbe et al.* v. *Blalock Motor Express, Inc.*

The pertinent provisions of Chapter 162 of the Code of Laws of South Carolina, 1932 (being Act No. 170 of 1925, as amended, *supra*), are summarized as follows:

Section 8507 declares that the term "motor vehicle carrier", wherever used in Sections 8507 to 8524 means every corporation or person, their lessees, trustees, or receivers, owning, controlling, operating or managing any motor propelled vehicle not usually operated on or over rails, used in the business of transporting persons or property for compensation over any improved public highway of the State; that the term "commission" means the South Carolina Railroad Commission; and defines other terms.

Section 8508 provides that

> "No corporation or person * * * shall operate any motor propelled vehicle * * * for transportation of persons or property for compensation on any improved public highways in this State except in accordance with the provisions of sections 8507 to 8524, and such operation shall be subject to control, supervision and regulation by the commission in the manner provided by sections 8507 to 8524: *Provided, however,* That nothing in sections 8507 to 8524 contained shall apply to motor vehicles while used exclusively for transporting persons to and from schools, Sunday schools, churches, or religious services of any kind, or to or from picnics or upon special prearranged excursions, or to United States mail carriers operating star routes, while engaged solely in carrying mail, or to farmers or dairymen, hauling

dairy or farm products; or lumber haulers engaged in transporting lumber and logs from the forest to the shipping points."

Section 8509 provides that

"No motor vehicle carrier shall hereafter operate for the transportation of persons or property for compensation on any improved public highway in this State without first having obtained from the commission, under the provisions of sections 8507 to 8524, a certificate and paid the license fee herein required. The commission shall have the power to grant six classes of such certificates * * * respectively designated as A, B, C, D, E, and F."

Section 8510 defines the different classes of certificates, and prescribes the terms and conditions upon which the same shall be issued.

"* * * the commission may grant a certificate E for property-carrying vehicles which will not operate upon any particular route or schedule. * * * The commission shall have power to grant a certificate F to any person, firm, or corporation, proposing to engage in the business commonly known as contract hauling of freight or property, and when such applicant does not propose to operate upon a regular schedule or over a regular route, or to solicit or receive patronage along the route."

Section 8511 provides that

"The commission shall, in the granting of a certificate, require the applicant to procure and file with said commission liability and property

damage insurance, or surety bond with some casualty or surety company authorized to do business in this State, on such motor vehicle or vehicles to be used in the service aforesaid, in such amount as the commission may determine, insuring or indemnifying passengers or cargo and the public receiving personal injury by reason of any act of negligence, and for damage to property of any person other than the assured; such policy or bond to contain such conditions, provisions, and limitations as the commission may prescribe and the same shall be kept in full force and effect, and failure to do so shall be cause for the revocation of such certificate. * * *''

Section 8512 provides for the payment by such motor vehicle carriers of certain license fees annually, graduated, as to the first four classes, upon a mileage basis, but as to classes E and F, as follows:

''The holders of certificates E and F shall annually on or before January 1 of each year pay to the commission the following fees: For vehicles of carrying capacity of not over one and one-half tons, thirty ($30.00) dollars; for vehicles of carrying capacity of over one and one-half tons and not over two tons, sixty ($60.00) dollars; for vehicles of carrying capacity of over two tons and not over three tons, one hundred twenty ($120.00) dollars; for vehicles of carrying capacity of over three tons and not over four tons, two hundred ($200.00) dollars; for vehicles of carrying capacity of over four tons and not over five tons, four hundred ($400.00) dollars; for vehicles equipped fully with pneumatic

tires; for vehicles equipped fully or partially with solid tires these fees shall be doubled. The fees required of holders of certificates C, E and F shall be in addition to any license tax or license fee charged by any municipality. * * *"

Section 8516 provides that

"The commission is hereby vested with power and authority and it shall be their duty to supervise and regulate every motor carrier in this State; to fix or approve the rates, fares, charges, classification and rules and regulations pertaining thereto, of each such motor carrier. * * *"

Section 8518 provides for the revocation of certificates by the commission for the willful violation of the provisions of this Chapter, or of the rules and regulations of the commission.

Section 8520 provides for the punishment of any person wilfully violating any of the provisions of Sections 8507 to 8524, or any lawful order, decision, rule, regulation, direction, demand or requirement of the commission, by a fine of not less than twenty-five ($25.00) nor more than one hundred ($100.00) dollars, or by imprisonment for not less than ten days nor more than thirty days.

Section 66 of the general appropriation act of 1931 (XXXVII Statutes at Large, page 454, after making appropriation for the Railroad Commission, provides as follows:

"*Provided, further,* That the expense of the Motor Transport Division provided in Item 2

shall be paid by the Motor Transport Carriers for hire subject to regulation by the Railroad Commission, in such proportion as the gross revenue of each and every person, firm or corporation engaged in such motor transport service for hire shall bear to the whole of such expenses. For the purpose of ascertaining such revenue each and every person, firm or corporation engaged in the business of motor tranportation for hire shall file with the Railroad Commission on or before the fifteenth day of September, 1931, a return under oath, showing the gross revenue derived from the business of hauling freight and/or passengers for hire by means of Motor Vehicles during the first six months of the calendar year 1931. The said Railroad Commission shall within thirty days after the receipt of such returns file with the Comptroller General a statement of all such gross revenues, and the Comptroller General is hereby authorized, empowered and directed to levy against all persons, firms or corporations so engaged in such business an assessment prorated in accordance with the proportion above set forth. The Comptroller General shall immediately certify to the State Treasurer the amounts of such assessments, and on or before the fifteenth day of October, 1931, all persons, firms, or corporations against whom any such assessment may be made shall pay to the State Treasurer the amount of the assessment so levied. Any person, firm or corporation failing or refusing to make the return herein provided or to pay the assessment levied in accordance therewith shall be subject to the immediate revocation of his, her or its license by the Railroad Commission. The assessment

made in accordance with this provision shall be in addition to all other taxes or licenses which may by law be assessed against said motor transport carriers for hire and shall constitute a first lien against the property used in such transport service, enforceable as are liens for all other taxes."

The respondents respectfully submit that the exemptions under the proviso to Section 8508, excluding from the application to them of the provisions of Chapter 162 certain favored classes, namely, "farmers and dairymen hauling dairy or farm products" and "lumber haulers engaged in transporting lumber and logs from the forest to the shipping points", have no reasonable basis, but are entirely arbitrary and discriminatory and in conflict with the Constitution of the United States.

Smith v. *Cahoon*, 283 U. S. 553; 51 S. Ct. 582; 75 L. Ed. 1264.

Nutt v. *Ellerbe*, 56 F. (2d), 1058.

Air-Way Electric Appliance Corporation v. *Day*, 266 U. S. 71, 85; 45 S. Ct. 12, 15; 69 L. Ed. 169.

Connolly v. *Union Sewer Pipe Co.*, 184 U. S. 540, 563, 564; 22 S. Ct. 431; 46 L. E.. 679.

Respondents further contend that Chapter 162 of Code of Laws of S. C., 1932, is unconstitutional in that although it does not in express terms demand that a private carrier shall constitute itself a common carrier, it purports to subject all the carriers which are within the terms of its definition to the same obliga-

tions. Such a scheme of regulation of the business of a private carrier, such as the respondents, is manifestly beyond the power of the State.

Smith v. *Cahoon, supra.*

Michigan Public Utilities Commission v. *Duke,* 266 U. S. 570; 45 S. Ct. 191; 69 L. Ed. 455; 36 A. L. R. 1105.

Frost & Frost Trucking Co. v. *Railroad Commission,* 271 U. S. 583, 592; 46 S. Ct. 605; 70 L. Ed. 1101; 47 A. L. R. 457.

The license fees required of contract carriers under Sections 8512 are based wholly on the "carrying capacity" of the vehicle, and, certainly as to those contract carriers engaged in interstate commerce, this tax is void, for the reason that it is not compensatory. The compensation which a State may exact of motor vehicles using its highways in interstate commerce must be based strictly upon the amount and extent of the used of the highways or it will be held to be an undue burden on interstate commerce; a flat charge based upon the capacity or weight of the vehicle alone is improper. Under the statutes of South Carolina, this license tax must be paid by an interstate carrier for a single trip into that State.

Interstate Transit, Inc., v. *Lindsey,* 283 U. S. 183; 51 S. Ct. 380; 75 L. Ed. 953.

Clark v. *Poor,* 274 U. S. 554; 47 S Ct. 702; 71 L. Ed. 1199.

If the provisions of Chapter 162, *supra,* be held to be unconstitutional for the reasons above set forth,

then the tax imposed upon contract carriers by Sec. 66 of the Act of 1931, *supra*, must likewise be held to be void as to them, inasmuch as such tax is imposed only upon those carriers subject to regulation by the commission, and for the further reasons (*a*) that said tax is imposed upon the entire gross receipts of such motor carriers, regardless of whether such receipts are derived from interstate or intrastate operations, and (*b*) is not in lieu of all other taxes.

Nutt v. *Ellerbe, supra.*

New Jersey Telephone Co. v. *Tax Board,* 280 U. S. 338.

Sprout v. *South Bend,* 277 U. S. 163, 170, 171.

Alpha Cement Co. v. *Mass.,* 268 U. S. 203, 218, 219.

Pullman Co. v. *Richardson,* 261 U. S. 330, 338.

Mayor v. *Wells,* 223 U. S. 298; 32 S. Ct. 218; 56 L. Ed. 445.

Fargo v. *Stevens,* 121 U. S. 230; 7 S. Ct. 857; 30 L. Ed. 888.

The decision of the Supreme Court of South Carolina, from which this appeal is prayed, was entered on January 27, 1933. This application for appeal is presented to the Chief Justice of the Supreme Court of South Carolina on the 24th day of April, 1933.

B. Wofford Wait,
Nathan J. Sinkler,
J. N. Nathans,
Attorneys for Respondents Appellants

Columbia, S. C., April 24, 1933.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 94

M. D. HICKLIN, INDIVIDUALLY, ETC.,
RESPONDENT-APPELLANT,

against

J. C. CONEY, EARLE R. ELLERBE, ET AL., AS MEMBERS OF AND CONSTITUTING THE RAILROAD COMMISSION OF SOUTH CAROLINA,
PETITIONERS-APPELLEES.

BRIEF OF APPELLANTS IN REPLY TO APPELLEES' OBJECTIONS TO THE JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

B. WOFFORD WAIT,
Attorney for Appellants.
J. N. NATHANS,
NATHAN & SINKLER,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 94

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BRIEF OF APPELLANTS IN REPLY TO APPELLEES' OBJECTIONS TO THE JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

As to Grounds of Objection to Jurisdiction

It is admitted that the appeal by *Blalock Motor Express, Inc.*, should be dismissed for failure of said appellant to file its appeal bond; and that the fourth assignment of error should be disregarded.

It is respectfully submitted that appellant's Statement as to the Jurisdiction of this Court fully complies with all of the requirements of Sec. 1 of Rule 12.

The basis upon which it must be determined whether the appeal is one properly within the jurisdiction of this Court is divided into three parts: first, whether a Federal question was presented for decision; second, whether its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment of the Court below could not have been rendered without deciding it; and, third, whether the appeal properly lies to this Court.

Apellee's Objections to the Jurisdiction do not run to any one of these questions. The sole purpose of the action was to inquire and determine whether the statute in question was repugnant to Sec. 8 of Art. 1 of the Constitution of the United States and to the Fifth and Fourteenth Amendments thereto. No local or State questions were involved. The constitutionality of the said statute was the only question presented, and this was necessarily a Federal question; this question was decided adversely to appellants by the Supreme Court of South Carolina, and its judgment could not have been rendered without such determination.

It is not even contended by the appellees' that such a question is not presented, but merely that the constitutional questions involved are not stated with sufficient particularity. This objection cannot be sustained, as appellant's assignments of error and statement of points to be relied upon specifically set forth the objectionable sections and portions of the statute, and the particular provisions of the Federal Constitution which each such section or portion violates.

It was said by Mr. Justice Brown in *American Sugar Refining Co. vs. State of Louisiana, et al.*, 179 U. S. 89; 21 S. Ct. 43; 45 L. Ed. 102, in refusing a motion to dismiss:

> "As, however, the protection of the 14th Amendment was invoked in the answer, and, as this defense is at least plausible upon its face, the motion to dismiss must be denied."

The Florida statute which was held to be unconstitutional in *Smith vs. Cahoon*, 283 U. S. 553; 51 S. Ct. 582; 75 L. Ed. 1264, was copied almost verbatim from the South Carolina statute here considered. It would be difficult to prepare a clearer, more forceful or more logical discussion of the questions presented by this appeal than is to be found in the opinion of Judge Cochran in the case of *Nutt vs. Ellerbe*, 56 F. (2d.) 1058, wherein the statute now under consideration was held to be unconstitutional.

It is not even contended that an appeal in the case at bar does not lie to this Court, nor that any procedural or technical questions are involved.

As to Motion to Dismiss or Affirm.

Under this motion appellees seek to argue this case upon its merits, which is manifestly premature and improper.

Appellant earnestly objects to the following statement in the first ground of the motion to affirm. (Page 4.)

> "The record in this case established that farmers and/or dairymen used the highways of the State only seasonally, during the harvest seasons of the year, that is during a few summer months and a few fall months, and that the use made by them is very light and insignificant as compared with the use made by appellant and others in like situation, operating fleets of large and heavy trucks from one end of the State to the other. It was also established that the Railroad Commission, which was charged with the duty of enforcing the Act, construed the exemption as running in favor only of farmers and dairymen whose principal business was farming and dairying and not in favor of farmers or dairymen who made a regular business of transport hauling for others."

There is no factual basis upon which the foregoing statement can be predicated. This Court will be amazed and shocked to learn not only that the appellees did not introduce

any testimony in support of the allegations of their petition, but also that the Supreme Court of South Carolina denied the appellant the right to offer any testimony. Appellant filed demurrers to the petition, but the Court, over appellant's objection, heard argument on the merits at the time when the demurrers were argued, and, before passing on the same, rendered final judgment when the demurrers were over-ruled, without taking any testimony whatever. Inasmuch as the return and answer of the appellant specifically denied the truth of every material allegation of fact in the appellees' petition and reply, thereby putting them in issue, it is apparent that appellant has not had his day in Court, and that any purported finding of fact in the decree is purely an assumption and without any proper foundation.

The Court held, at page 679 (*ex rel. Coney et al., v. Hicklin et al.*, 176 S. E., 674): "We think the respondents have failed to sustain the burden cast upon them of showing beyond a reasonable doubt that the exemption in question renders the Act unconstitutional and invalid."

It is true that in cases where the *plaintiff* attacks the constitutionality of a statute the burden is cast upon him of demonstrating the invalidity of such statute. But, in the case at bar, the appellees, who instituted the action, alleging the validity of the statute, assumed the burden of establishing such validity, and it is, to say the least, a novel proposition of law to hold that the *defendant* in a civil action must establish his defense "beyond a reasonable doubt." In its decree, the Court below merely assumed every allegation of the petition and reply to be true, and every allegation of the return and answer to be false.

The foregoing remarks apply with equal force to the second ground of appellees' motion, wherein it is stated that appellant's objections to the validity of the statute, based upon its provisions relative to (a) cargo insurance, and (b) the duty of the commission to regulate the rates and fares of ap-

pellant and others in like situation, may be disposed of by reason of the fact that there was no showing that the commission had ever undertaken to enforce the said provisions of the Act. It certainly should be sufficient to say that appellant has never been afforded any opportunity to make such showing.

The general rule that the decision of a State Supreme Court construing a state statute will be accepted as final and conclusive is subject to certain exceptions, one of which is that such construction will not be adopted when such statutory provision is alleged to violate a federal statute. There is absolutely nothing in the statute itself to indicate that contract carriers were not required to carry cargo insurance. There is no allegation in the petition or reply to the effect that the commission did not enforce such requirements. This requirement was added to the original Act by an amendment passed at the same session of the legislature which further amended the original Act by making contract carriers subject thereto. These two Acts were adopted within 10 days of each other. The Act provides a penalty by fine or imprisonment for the violation of any of its provisions. As held in *Smith v. Cahoon, supra,* it is improper for the legislature to impose upon a citizen the duty and necessity of determining for himself the valid or invalid provisions of an Act, for the violation of which penal remedies are provided.

As to the third ground of such motion, it is deemed sufficient to say that the Court below completely ignored the rule announced by this Court in the following cases: *Interstate Transit, Inc. v. Lindsey,* 283 U. S., 183; 51 S. Ct., 380; 75 L. Ed., 953, and *Clark v. Poor,* 274 U. S. 554; 47 S. Ct., 702; 71 L. Ed., 1199: which, it is respectfully submitted, has not been either reversed or modified, and which is peculiarly applicable to the South Carolina statute.

Appellees' principal contention is that the case of *Smith v. Cahoon, supra,* has been so modified by the decision of this

Court in *Continental Baking Co. v. Woodring*, 286 U. S., 352; 52 S. Ct., 595; 76 L. Ed., 816, as to be of no further force and effect. The force of this contention, however, is lost upon a careful examination of the differences between the statutes under consideration in these two cases.

In *Continental Baking Co. v. Woodring, supra*, the following language occurs:

> "The distinction in the instant case is of a different sort. The statute does not attempt to impose any arbitrary discrimination between carriers who transport property for hire, or compensation, with respect to the class of products they carry. The exemption runs only to one who is carrying his own livestock and farm products to market or supplies for his own use in his own motor vehicle."

Appellees' principal contention in the Court below was, as appears in the first paragraph of their reply, that the Railroad Commission had uniformly construed the statute in question as exempting farmers and dairymen only when hauling their own products, or only when hauling occasionally, and not as a regular business; and that the commission had adopted and promulgated a formal regulation to that effect since the institution of this action, thereby seeking to bring themselves within the decision in *Continental Baking Co. v. Woodring, supra.* But the Court below refused to adopt such construction in the following language:

> "It will be observed that this conclusion has been reached independently of the construction placed by the Railroad Commission upon the contested provision of the Act. We think that this construction is, in part, unsound. One hauling his own products in his own motor vehicle does not come within the purview of the Act and no provision for this exemption is necessary. The Act applies only to those who are carriers for compensation, and the exemption can refer only to farmers and dairy-

men hauling farm and dairy products for compensation. The same may be said with regard to those hauling lumber and logs from the forest to the shipping points."

Hence, it is readily apparent that the same basis upon which this Court differentiated between the Florida statute and the Kansas statute in the two last cited cases does not apply in the case at bar.

For the foregoing reasons it is respectfully submitted that the appellees' objection to the jurisdiction should be overruled, and that their motion to dismiss the appeal or affirm the judgment should be dismissed.

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Supreme Court of the United States

OCTOBER TERM, 1933

No. 94

M. D. HICKLIN, INDIVIDUALLY, AND AS A REPRESENTATIVE OF CLASS "F" CARRIERS WITHIN THE PROVISIONS OF SECTIONS 8507–8530 OF CHAPTER 162 OF THE SOUTH CAROLINA CODE OF 1932, WHO ARE, OR CLAIM TO BE, ENGAGED IN INTERSTATE COMMERCE, AS WELL AS INTRASTATE OPERATIONS WITHIN THE STATE OF SOUTH CAROLINA, RESPONDENT-APPELLANT,

versus

J. C. CONEY, EARLE R. ELLERBE ET AL., AS MEMBERS OF AND CONSTITUTING THE RAILROAD COMMISSION OF SOUTH CAROLINA, PETITIONERS-APPELLEES.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

BRIEF ON BEHALF OF APPELLANT

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OPINION BELOW

The opinion of the Supreme Court of the State of South Carolina is reported in 168 S. C., 440, 167 S. E., 674 (1933), and is reproduced in the record.

JURISDICTION

The final decree or judgment of the South Carolina Supreme Court was rendered on January 27, 1933.

The application for appeal therefrom was presented and the order allowing appeal entered on April 24, 1933. Service of the petition for appeal, assignments of error, statement as to jurisdiction, and order allowing the appeal was acknowledged, and issuance of citation waived, on May 22, 1933.

Probable jurisdiction has been noted by this Court.

The claims advanced in the lower Court, which are relied upon as the basis of this Court's jurisdiction, were that Act No. 170 of 1925 (XXXIV Statutes at Large, 252), now appearing, as amended from time to time, as Chapter 162 (Sections 8507–8524) of the Code of Laws of S. C., 1932, Volume III, 954, is invalid on the ground of being repugnant to the Fifth and Fourteenth Amendments to the Constitution of the United States, and to Article I, Section 8, thereof. The rulings made were that said South Carolina statute is valid and not repugnant to the Constitution.

The jurisdiction of this Court is invoked under the Acts of Congress of February 13, 1925, 43 Stat., 936, and January 31, 1928, 45 Stat., 54, appearing as Section 237 (a) of the Judicial Code (28 U. S. C. A. Section 344), providing, in part, that:

> "a final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had . . . where is drawn in question the validity of a statute of any State on the ground of being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be

reviewed by the Supreme Court upon a writ of error" (U. S. Code, Title 28, Section 344).

Under the former practice a writ of error would have been issued. This appeal is taken under Sections 861 (a) and 861 (b) of Title 28 of the United States Code, as amended April 26, 1928, and under Rule 46 of the Rules of this Court, effective July 1, 1928.

STATEMENT OF CASE

This case is before this Court on appeal. The Railroad Commission of South Carolina filed a petition in the original jurisdiction of the Supreme Court of South Carolina against this appellant "individually, and as a representative of Class 'F' carriers within the provisions of Sections 8507-8530 of Chapter 162 of the South Carolina Code of 1932, who are, or claim to be, engaged in Interstate Commerce, as well as intrastate operations within the State of South Carolina." It was alleged and admitted that the appellant was a private contract carrier, engaged in the business of transporting property for hire over the public highways of South Carolina by motor vehicle without a certificate and without having paid the license fees required under said Chapter 162, and in violation of the provisions thereof. He does not operate on a regular schedule over a specific route, nor between fixed termini. He is not a common carrier, and has never held himself out as a carrier to the public.

The statute in question was held to be unconstitutional by the District Court of the United States for the Eastern District of South Carolina in the case of *Nutt v. Ellerbe*, 56 F. (2d), 1058—decided by a three-Judge Court—the opinion wherein was filed March 9, 1932. The Railroad Commission declined to recognize the authority of that decision—although no appeal was taken therefrom—except as to the plaintiff, John P. Nutt, and continued to exact payment of Class F license fees from appellant and other contract carriers. Shortly before the institution of this action the appellant had filed a suit on behalf of himself and such other Class F, or contract, carriers as desired to participate therein and contribute to the cost thereof, against the Railroad Commission, in the said District Court of the United States for the Eastern District of South Carolina, for the purpose of having said statute declared unconstitutional and restraining the Railroad Commission from further enforcing the same. This action was then begun in the original jurisdiction of the Supreme Court of South Carolina avowedly to have the said statute construed

by that Court and enforced by mandatory injunction, and admittedly for the purpose of forestalling a decision by the said District Court and ousting it of jurisdiction.

Appellant interposed a demurrer to the petition, but, when the case was called in the Supreme Court of South Carolina, the Court, over appellant's objection, heard argument on the merits, as well as on the demurrer, although no testimony had been offered in support of the petition, and appellant's request to be allowed to offer testimony in his behalf was denied.

In reaching its conclusion that the statute in question, as construed and applied to the appellant, which, according to the plain and natural meaning of its provisions, required him, as a private carrier, to assume the duties, burdens and obligations of a common carrier and become subject to the same rules and regulations, was constitutional, the Court specifically ruled that, notwithstanding the status of appellant as a private carrier, he was nevertheless subject to those provisions of Chapter 162 requiring him to obtain a certificate, pay certain license fees, and carry certain kinds of insurance; but that the provisions of the statute requiring all carriers for hire to carry cargo insurance were intended by the legislature to apply to Class D, or common, carriers, only, and not to appellant. In other words, all of those provisions of the statute, applicable by its terms to both classes of carriers, which did not serve to render the statute unconstitutional as to contract carriers, were held to be valid and applicable to both common and contract carriers; but those provisions of the statute which, if applied to contract carriers, would render the same unconstitutional, were arbitrarily declared inapplicable, as to them, although no such differentiation was pointed out in the statute itself.

SPECIFICATIONS OF ERROR

The ultimate error assigned is that the Supreme Court of South Carolina erred in holding as a matter of law that Chapter 162 of the Code of Laws of S. C., 1932, as construed and applied to this appellant, was a lawful and constitutional stat-

ute. The detailed specifications of error (all of which, except the fourth and fifth, are intended to be urged here), are set forth in the assignments of error.

THE STATUTE INVOLVED*

Chapter 162 of the Code of Laws of S. C., 1932, provides for the supervision and regulation by the Railroad Commission of South Carolina and also for the taxation of all motor-vehicle carriers of persons or property for compensation over the improved public highways of the State.

In Sec. 8507 (d) the term "motor-vehicle carrier" is defined to mean every corporation or person, their lessees, trustees or receivers, owning, controlling, operating or managing any motor propelled vehicle not usually operated on or over rails, used in the business of transporting persons or property for compensation over any improved public highway or streets as hereinafter defined, in this State.

By Sec. 8508 all corporations and persons are prohibited from operating any motor-propelled vehicle for transportation of persons or property for compensation on any improved public highways in the State except in accordance with the provisions of said Chapter 162, and subject to the control, supervision and regulation of the Railroad Commission: *"Provided, however,* That nothing in sections 8507 to 8524 contained shall apply to motor vehicles while used exclusively for transporting persons to and from schools, Sunday schools, or religious services of any kind, or to or from picnics or upon special prearranged excursions, or to United States mail carriers operating star routes, while engaged solely in carrying mail, *or to farmers or dairymen, hauling dairy or farm products; or lumber haulers engaged in transporting lumber and logs from the forest to the shipping points."* (Italics ours.)

By Sec. 8509 no motor vehicle carrier is permitted to "operate for the transportation of persons or property for compensation on any improved public highway in this State without

*The text of the pertinent provisions of the statute is set forth in Appendix A.

first having obtained from the Commission, under the provisions of Sections 8507 to 8524, a certificate and paid the license fee herein required. The Commission shall have the power to grant six classes of such certificates . . . ", designated, respectively, as Classes A, B, C, D, E and F.

By Sec. 8510 the different classes of certificates are defined, and the terms and conditions upon which the same shall be issued are prescribed. ". . . the commission shall have power to grant a Certificate F to any person, firm, or corporation, proposing to engage in the business commonly known as contract hauling of freight or property, and when such applicant does not propose to operate upon a regular schedule or over a regular route, or to solicit or receive patronage along the route." The foregoing provision was added to the original Act by an amendment approved the 7th day of April, 1930: see XXXVI Statutes at Large, 1068.

Section 8511 provides that:

> "The commission shall, in the granting of a certificate, require the applicant to procure and file with said commission liability and property damage insurance, or surety bond with some casualty or surety company authorized to do business in this State, on such motor vehicle or vehicles to be used in the service aforesaid, in such amount as the commission may determine, insuring or indemnifying passengers *or cargo* and the public receiving personal injury by reason of any act of negligence, and for damage to property of any person other than the assured; such policy or bond to contain such conditions, provisions, and limitations as the commission may prescribe and the same shall be kept in full force and effect, and failure to do so shall be cause for the revocation of such certificate. . . . "

Let it be observed in this connection that this section is also an amendment to the original Act, and was likewise approved on April 7, 1930: See XXXVI Statutes at Large, 1327.

Section 8512 provides for the payment by such motor vehicle carriers of certain license fees annually, graduated, as

to the first four classes, upon a mileage basis, but as to Classes E and F, as follows:

> "The holders of Certificates E and F shall annually on or before January 1 of each year pay to the commission the following fees: For vehicles of carrying capacity of not over one and one-half tons, thirty ($30.00) dollars; for vehicles of carrying capacity of over one and one-half tons and not over two tons, sixty ($60.00) dollars; for vehicles of carrying capacity of over two tons and not over three tons, one hundred twenty ($120.00) dollars; for vehicles of carrying capacity of over three tons and not over four tons, two hundred ($200.00) dollars; for vehicles of carrying capacity of over four tons and not over five tons, four hundred ($400.00) dollars; for vehicles equipped fully with pneumatic tires: for vehicles equipped fully or partially with solid tires these fees shall be doubled. The fees required of holders of Certificates C, E and F shall be in addition to any license tax or license fee charged by any municipality. . . ."

Section 8516 provides that:

> "The commission is hereby vested with power and authority and it shall be their duty to supervise and regulate every motor carrier in this State; to fix or approve the rates, fares, charges, classification and rules and regulations pertaining thereto, of each such motor carrier. . . ."

Section 8518 provides for the revocation of certificates by the commission for the willful violation of the provisions of this Chapter, or of the rules and regulations of the commission.

Section 8520 provides for the punishment of any person willfully violating any of the provisions of Sections 8507 to 8524, or any lawful order, decision, rule, regulation, direction, demand or requirement of the commission, by a fine of not less than Twenty-five ($25.00) Dollars nor more than One Hundred ($100.00) Dollars, or by imprisonment for not less than ten days nor more than thirty days.

Section 8525 provides for the payment of certain additional license fees by every owner or operator of motor vehicles engaged in transporting persons or property for compensation.

SUMMARY OF ARGUMENT

I. The South Carolina statute under review is substantially identical with the Florida statute, which was held unconstitutional by this Court in *Smith v. Cahoon*, 283 U. S., 553, and with the California statute, which was held unconstitutional by this Court in *Frost v. Railroad Commission of California*, 271 U. S., 583. In the instant case, as in the last two cited cases, the statute is a regulation of the business of transportation for compensation.

As written, the statute is plain and clear enough, encompassing both private and common carriers within the scope of all of its provisions, and, so read, is unconstitutional under the last cited cases. In its ineffectual attempt to save this statute from the fate of the California and Florida statutes, the South Carolina Court ruled, with obvious violence to the plain wording of the statute, that the provisions relative to cargo insurance were not applicable to private carriers, but declined to pass upon the question of whether the rates of such common carriers were subject to regulation by the commission, upon the ground that the commission, in plain violation of the duty imposed upon it by the statute, had so far made no attempt at such regulation. Hence, the statute, otherwise definite, becomes so vague and indefinite as to deprive appellant of his liberty and property without due process of law.

II. The appellant cannot be subjected to compliance with a statute which, on its face, is patently discriminatory. Neither the type of commodities nor the classes of persons exempted from the operation of the statute furnish a reasonable ground on which to rest this classification. *Smith v. Cahoon, supra; Nutt v. Ellerbe, supra.* The Court below attempted to differentiate between the *Cahoon case* and the case at bar upon the ground that there is a double element involved in the classification, the class of persons and the class of prod-

ucts, while there was only on element of classification involved in the *Cahoon case*, namely, the class of products. But it is respectfully submitted that this alleged justification merely intensifies the vice of the statute.

III. The license fees required of contract carriers under Section 8512 are based wholly on the "carrying capacity" of the vehicle, and, certainly as to those contract carriers engaged in interstate commerce, this tax is void, for the reason that it is not compensatory. The compensation which a State may exact of motor vehicles using its highways in interstate commerce must be based strictly upon the amount and extent of the use of the highways or it will be held to be an undue burden on interstate commerce; a flat charge based upon the capacity or weight of the vehicle alone is improper. Under the statutes of South Carolina, this license tax must be paid by an interstate carrier for a single trip into that State.

Interstate Transit, Inc., v. Lindsey, 283 U. S., 183, 51 S. Ct., 380, L. Ed., 953.

Clark v. Poor, 274 U. S., 554, 47 S. Ct., 702, 71 L. Ed., 1199.

POINT I

Chapter 162, Code of Laws of South Carolina, 1932, requires the appellant, admittedly a private carrier, to dedicate nis property to the *quasi*-public use of public transportation, thus taking his private property for public use without just compensation, and depriving him of his property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

The South Carolina statute under review is identical in many particulars with the Florida statute, which was held unconstitutional by this Court in the case of *Smith v. Cahoon*, 283 U. S., 553, 51 S. Ct., 582, 75 L. Ed., 1264, and the California statute which was also held unconstitutional by this Court in *Frost v. Railroad Commission of California*, 271 U. S., 583. The South Carolina statute and the Florida statute are set out in parallel columns in Appendix A for the purpose

of illustrating the striking similarity in their phraseology, purpose and effect.

The principal difference between the two cases last cited and the case at bar lies in the fact that under the statutes considered in the cited cases a private carrier was required to obtain a certificate of public convenience and necessity. In the South Carolina statute the difference between Class D carriers and Class F carriers lies in the fact that it is necessary to obtain a certificate of public convenience and necessity in order to qualify as a Class D operator, whereas it is only necessary to obtain a certificate in order to qualify as a Class F carrier. The term "common carrier" does not appear in the South Carolina statute in those sections relating to the regulation of carriers of property; but it is respectfully submitted that those requirements of the South Carolina statute relating to Class D certificates, namely, providing for operation over a regular route, upon regular schedules, and between fixed *termini*, the establishment of tariffs and fixed rates, and compelling an applicant for a Class D certificate to become an insurer, are the salient characteristics of a common carrier: it should be borne in mind that the original Act No. 170 of 1925, *supra*, related solely to common carrier operations, and this litigation has arisen from the fact that the Legislature subsequently amended this Act so as to include private, or contract carriers, and, by such amendment, attempted to make them subject to the rules and regulations theretofore provided as to common carriers.

The statute in question cannot be construed save as a regulation of the business of those who engage in transportation of goods for compensation on the public highways. It does not even purport to relate to public safety, and is not bottomed upon the police power of the State. That the regulation of the business of transporting persons or goods for hire, and the regulation of traffic on the public highways so as to insure safety of travel or to preserve the public highways, are separate and distinct subjects is generally recognized by the Courts. In the *Frost case, supra*, the Supreme Court of Cali-

fornia concluded that the legal effect of the provisions of the Act was to subject a private carrier to the same rules and regulations as a common carrier, thus constituting a dedication of the private property to the *quasi* use of public transportation. In the case of *Smith v. Cahoon, supra,* the Florida Court concluded that the statute under review did not require private carriers to become common carriers, even though it held specifically that the certificate of convenience and necessity as set out in the statute could be reasonably required of a private carrier as a condition precedent to his use of the highways. That construction was not upheld by this Court. In the instant case, the statute, according to the plain and natural meaning of its terms, requires a private, or contract, carrier, to obtain a certificate, to keep in force cargo insurance, and to be subjected to regulation of its rates and charges by the commission. There is nothing in the statute itself to indicate which regulatory provisions relate to the holders of Class D certificates only, in contradistinction to the holders of Class F certificates. All stand upon an equal footing. Yet, by the terms of the statute, the violation of any of its provisions, or of the rules and regulations promulgated by the commission, is made a misdemeanor, punishable by fine or imprisonment, or both. And it was specifically held in *Smith v. Cahoon, supra,* that a statute which provided no guide whereby a citizen could determine which of its provisions were applicable to him, yet imposed upon him the necessity of determining for himself and at his peril what provisions he might safely ignore, was so vague, indefinite and uncertain as to be repugnant to the Federal Constitution.

It is true that the Court below held that the Legislature did not intend to make the requirement as to cargo insurance applicable to contract carriers, and the appellees will undoubtedly urge that this Court is bound by the State Court's declaration upon that point. We submit, however, that it is within the power of this Court to review such a legal conclusion, unsupported by any testimony, just as much as it is within the power of this Court to overrule a State Court's finding that a

statute is not discriminatory when, as a matter of law, it is; *Quaker City Cab Company v. Pennsylvania*, 277 U. S., 389, just as much as it is within the power of this Court to inquire, regardless of a State Court's finding, whether or not a business is affected with a public necessity; *Wolff Packing Company v. Industrial Court*, 262 U. S., 522, just as much as it is within the power of this Court to determine the nature of a levy, whether a tax or penalty, notwithstanding the fact that a State Court has considered it to be a tax; *St. Louis Cotton Compress Company v. Arkansas*, 260 U. S., 346, 348. The two amendments to Act No. 170 of 1925, one (XXXVI Statutes at Large, 1068), providing for the issuance of Class F certificates and subjecting contract carriers to the provisions of said Act No. 170, and the other (XXXVI Statutes at Large, 1327), requiring cargo insurance, were enacted at the same session of the Legislature, and were approved by the Governor on the same date. We have been unable by any process of reasoning to discover the basis of the Court's finding to the effect that the Legislature did not intend to put common carriers and private contract carriers on the same footing with regard to cargo insurance. The attention of the Court below had been earnestly directed to the case of *Michigan Public Utilities Commission v. Duke*, 266 U. S., 570, 45 S. Ct., 191, 69 L. Ed., 445, 36 A. L. R., 1105, wherein it was held that to require cargo insurance of a private contract carrier as a condition precedent to his right to engage in business as such, in effect compelling him to become a common carrier, would render the statute repugnant to the Constitution of the United States. This doctrine was expressly recognized and affirmed in the case of *Smith v. Cahoon*, *supra*. The irresistible conclusion seems to be that the Court below recognized that it would be bound to hold the statute unconstitutional unless it found that such provisions did not apply to the appellant and other contract carriers, and arbitrarily held such to be the case.

As we understand the rule, this Court is bound by the State Court's construction only as to the meaning of a statute and

to whom it applies, and not by any legal conclusion deduced therefrom.

As to the nature and legal effect of the statutory provisions regulating private carriers, a review by this Court is not only proper, but, in substance, is the justification and foundation of its jurisdiction.

No machinery is here set up to deal with private carriers separately from common carriers. The only distinction set out in the statute is that a common carrier must obtain a certificate of public convenience and necessity, and pay license fees therefor according to one schedule, whereas the contract carrier is merely required to obtain a certificate, and to pay license fees according to a different schedule. The common carrier is licensed to operate over a regular route, upon regular schedule, and between fixed *termini*. The contract carrier is not permitted to operate upon a regular schedule or over a regular route, *or to solicit or receive patronage along the route* (italics ours), which latter provision denies him the primary and most essential right of a common carrier; yet, on the other hand, he is required to assume the burdens of a common carrier.

As lucidly stated by Mr. Justice Brandeis in *Buck v. Kuykendall*, 267 U. S., 307, 815, a certificate of public convenience and necessity

> "is not regulation with a view to safety, or to conservation of the highways, but the *prohibition of competition*. It determines not the manner of use, but the persons by whom the highways may be used . . . (it) is designed primarily to promote *good service by excluding unnecessary competing carriers.*"

No other reasonable basis for requiring contract carriers to obtain a "certificate" occurs to us, except the sordid one of raising more revenue. The commission is vested with the discretion to limit the number of common carrier certificates issued by it, but is required to issue a certificate as a contract carrier to any person who is willing to pay the fees, provided

he be willing to assume the burdens and at the same time to renounce the privileges of a common carrier.

This, we submit, constitutes a dedication of "his property to the *quasi*-public use of public transportation" (*Frost v. Railroad Commission of California, supra*), notwithstanding any ruling of the South Carolina Supreme Court to the contrary.

The ruling of the Court below in reference to the cargo insurance requirements plainly shows that the Court strained to reach a wholly forced construction in its attempt to circumvent the decisions of this Court in the *Frost, Duke* and *Cahoon cases, supra,* when it attempted to plumb the depths of the legislative mind and stated, with obvious violence to the plain wording of the statute, that the Legislature did not intend for that provision to be applicable to contract carriers. In other words it held indirectly, where the Florida Court in the *Cahoon case* had held specifically, that the Legislature had intended only those provisions, which were legally applicable to private carriers, to be applicable to private carriers, and those provisions which were legally applicable only to common carriers, to be applied to such common carriers. This, despite the fact that the whole statute is framed to regulate all persons or corporations engaged in the business of transporting persons or property for compensation by motor vehicles over the improved highways of the State. This, despite the fact that the statute specifically includes both common and contract carriers. This, despite the fact that each and every provision of the statute is directed and addressed to private and public carriers for hire alike and without distinction.

Undoubtedly the South Carolina Court was in a dilemma. As written, the statute is plain and clear enough, encompassing as it does, both private and common carriers within the scope of all its provisions and, so read, is unconstitutional under the last cited decisions. In trying to save this statute from the fate of the California, Michigan and Florida statutes, ineffectual though such effort was, the South Carolina Court is impaled upon the other horn of the dilemma. As construed

by it, the statute, otherwise definite, becomes so vague and indefinite as to deprive the appellant of his liberty and property without due process of law. By such construction the appellant and others similarly situated are not informed as to what standard of conduct is required of them lawfully to pursue their business; no norm of conduct is given them by which they can measure the legality of their case.

Appellees, as well as the Court below, seek to avoid the force of the decision of this Court in the *Cahoon case* upon the ground that that was a criminal case, whereas the instant case is a proceeding in equity. But Section 8520 of Chapter 162 makes it a crime for any one to violate any provision of the Act. Hence, the entire Act must be viewed in the light of a penal statute.

Penal provisions, in order to satisfy the first essential requirements of due process under the Fifth and under the Fourteenth Amendments, must be so clearly and definitely expressed that an ordinary man can determine in advance whether a contemplated act is within or without the law. On the other hand, they must not be so broad and elastic in their terms as to compel a man to guess at his peril whether his act is in violation of them. In short, if deviation from the standard provokes a penalty the standard must be definitely fixed. *United States, Cohen Grocery Company,* 255 U. S., 81, 89; *Weeds, Incorporated, v. United States,* 255 U. S., 109; *Cline v. Frink Dairy Company,* 274 U. S., 445, 454; *Connally v. General Construction Company,* 269 U. S., 385; *International Harvester Company v. Kentucky,* 234 U. S., 216; *Collins v. Kentucky,* 234 U. S., 634, 638; *American Seeding Machine Company v. Kentucky,* 236 U. S., 660; *United States v. Capitol Traction Company,* 34 D. C., Appeals, 595; *Louisville & N. R. Company v. Railroad Commission of Tennessee,* 19 Fed., 679; *Tozer v. United States,* 52 Fed., 917; *Commonwealth v. Louisville & N. R. Company,* 46 S. W. (Ky.), 700. By the same token, a statute, otherwise definite, is unconstitutional if made vague and indefinite by construction. *United*

States v. Reese, 92 U. S., 214, 221; *Trade Mark Cases*, 100 U. S., 82; *Yu Cong Eng v. Trinidad*, 271 U. S., 500, 517.

In the latter case, the late Mr. Chief Justice Taft, said, on page 522:

> "The effect of the authorities we have quoted is clear to the point that we may not in a criminal statute reduce its generally inclusive terms so as to limit its application to only that class of cases which it was within the power of the legislature to enact, and thus save the statute from invalidity."

And this rule should be most strictly applied to statutes which create new offenses, that is, where the sovereign state for the first time is attempting to punish a course of conduct which theretofore was recognized as legal. *United States v. Reese, supra; United States v. Brewer*, 139 U. S., 278; *United States v. Sharp*, Pet. C. C. 118, 122 (Fed. Case No. 16,264); *Northern Pac. Ry. Co. v. U. S.*, 213 Fed., 162.

POINT II

To require a certificate of the appellant, and to exempt other private carriers similarly situated from such regulation is to deny the appellant the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

Assuming *arguendo* that the State of South Carolina has the power to subject the appellant to all of the provisions and requirements of said Chapter 162 as a condition precedent to his use of its highways we submit, nevertheless, that, in the instant case, the appellant cannot be subjected to the exercise of that power by a statute which, on its face, is patently arbitrary, discriminatory and unreasonable.

Under the statute, not all private carriers are subjected to regulation; indeed not all common carriers are subjected to regulation. The proviso to Section 8508 reads:

> "*Provided, However*, That nothing in Sections 8507 to 8524 contained shall apply to motor vehicles while used exclusively for transporting persons to and from schools, Sunday schools, churches, or religious services

of any kind, or to or from picnics or upon special prearranged excursions, or to United States mail carriers operating star routes, while engaged solely in carrying mail, or to farmers or dairymen, hauling dairy or farm products; or lumber haulers engaged in transporting lumber and logs from the forest to the shipping points."

Exempt from the operation of the statute, among others, are certain classes of persons engaged in the business of transporting commodities of the principal industries of South Carolina; in short, the exemptions swallow up the rule. Our attack is based upon the discrimination between different classes of persons engaged in the same business of transporting for hire, and differing only in occupation and in the kind of commodities making up their loads.

The State, in the exercise of its police power, can undoubtedly classify the subjects of regulation; but such classification must be based upon some reasonable ground —some difference which bears a just and proper relation to the attempted classification—and is not mere arbitrary selection.

The appellees' contention in the Court below was that the foregoing proviso "was intended in fact to exempt such persons only when they were hauling their own products and not engaged in transportation for hire and that said proviso had been and was continuing to be construed by them" (Petition, paragraph 6). It is evident from the fact that, while the Court below upheld their contention that the aforesaid proviso was not in fact discriminatory, and sustained their conclusion, it denied the factual premises on which the same was based. Said the Supreme Court of South Carolina: "It will be observed that this conclusion has been reached independently of the construction placed by the railroad commission upon the contested provision of the Act. We think that this construction is in part, unsound. One hauling his own products in his own motor vehicle does not come within the purview of the Act and no provision for this exemption is necessary. The Act ap-

plies only to those who are carriers for compensation, and the exemption can refer only to farmers and dairymen hauling farm and dairy products for compensation. The same may be said with regard to those hauling lumber and logs from the forest to the shipping points."

To that extent the Supreme Court of South Carolina coincided with the view of the three-judge District Court in the case of *Nutt v. Ellerbe, supra,* wherein Judge Cochran, who delivered the opinion of the Court, disposed of the same contention in the following forceful language:

> "There is no doubt that the Legislature, so far as the Federal Constitution is concerned, may classify objects of taxation; but such classification must not be arbitrary, and must have some reasonable basis. Here the plaintiff is a private contract carrier for compensation. The State imposes upon him, for hauling freight and property over the highways of the State, a tax; but a farmer may haul farm products for compensation, a dairyman may haul dairy products for compensation, and lumber haulers may haul lumber and logs from the forests to shipping points for compensation, and are not required to pay any taxes or be subject to the regulations provided in the Act. We can perceive no reason whatever why the one should be taxed and not the others. They are all private contract carriers and not common carriers; they all use the highways of the State; they all obtain compensation for their services; and they all carry freight and property. The mere fact that the carrier in one case is a farmer or a dairyman hauling dairy or farm products, or a lumber hauler transporting lumber and logs, while in the plaintiff's case he is transporting various other kinds of property, furnishes no valid ground for discrimination. Indeed, under the terms of the Act, the plaintiff cannot even haul farm or dairy products, or lumber from the forests to shipping points, without paying the tax. No valid reason can be suggested why a tax should be imposed in one case and not in the

other. It is unnecessary to enter into any discussion of the numerous cases upon the subject of the right of the State to classify for taxation. It is sufficient to say that we think this case is controlled by the principles announced by the Supreme Court in *Smith v. Cahoon, Sheriff*, 283 U. S. 553.

"We do not consider it necessary to decide now whether the other exemptions mentioned in the statute would render it unconstitutional or not; but we do hold that the exempting of farmers, dairymen and lumbermen renders the statute invalid as to this plaintiff.

"Counsel for the defendants argues that the statute was not intended to exempt farmers, dairymen and lumbermen, except where they are hauling their own products; but the Act provides for the regulation and taxation of all private contract carriers for hire and expressly excludes farmers and dairymen hauling farm or dairy products, and lumber haulers transporting logs, etc., from its operation. There is not a syllable in the Act to indicate that the Legislature meant to confine the exemption to those engaged in hauling their own products. Indeed, if such was the intention, the provision for such exemption would be entirely superfluous, for the Act, by its very terms, does *not apply* to those engaged in hauling *their own products*, but only to those who are carriers *for compensation*."

The appellees' contention that the decision in the *Cahoon case, supra*, has, in this respect, been practically nullified by a later decision in *Baking Company v. Woodring*, 286 U. S., 352, 52 S. Ct., 595, 76 L. Ed., 816, is shown to be groundless in one sentence quoted therefrom by the Supreme Court of South Carolina in deciding the case at bar, to wit: "The distinction in the instant case is of a different sort. The statute does not attempt to impose any arbitrary discrimination between carriers who transport property for hire, or compensation, with respect to the class of products they carry. The exemption runs only to one who is carrying his own live stock

and farm products to market or supplies for his own use in his own motor vehicle."

The *Cahoon case* was expressly affirmed in the *Baking Company case, supra.* The Kansas statute, therein construed, purported to regulate all carriers of goods by motor vehicles, whereas the statute now under review seeks to regulate only those carriers of goods and property who haul for hire. Certainly, a classification of those who haul for hire on the one hand, and those who carry their own products in their own vehicles on the other hand, is an entirely reasonable and justifiable classification. But the difference between the Kansas statute, construed in *Baking Company v. Woodring, supra,* and the statute here under review, even upon the most cursory examination, is so great, and the similarity between the Florida statute, construed in *Smith v. Cahoon, supra,* and the South Carolina statute, is so striking, that it seems that the doctrine of *Smith v. Cahoon* should control the instant case.

POINT III

The burdens imposed by said Chapter 162 upon contract carriers who are engaged in interstate commerce are so onerous as to constitute an undue burden thereon, in violation of Section 8 of Article I of the Constitution of the United States.

It is alleged in the petition and admitted in the return and answer that the appellant is engaged in interstate commerce.

The license fees required of contract carriers under Section 8512 are based wholly on the "carrying capacity" of the vehicle, and, certainly as to those contract carriers engaged in interstate commerce, this tax is void, for the reason that it is not compensatory. It is a well recognized doctrine that a State can recover of motor vehicles using its highways in interstate commerce a reasonable compensation for the use of such highways, but, in the most recent cases of the United States Supreme Court upon this point, the rule is plainly stated that such compensation must be based strictly upon the amount and extent of the use of the highways or it will be held to be an undue burden on

interstate commerce; and that a flat charge based upon the capacity or weight of the vehicle alone is improper. Under the statutes of this State, this license tax must be paid by an interstate carrier for a single trip into South Carolina. The latest case on this point is that of *Interstate Transit, Inc., v. Lindsey*, 283 U. S., 183; 51 S. Ct., 380; 75 L. Ed., 953, in which it was said:

> "But since a State may demand of one carrying on an interstate bus business only fair compensation for what it gives, such imposition, although termed a tax, cannot be tested by standards which generally determine the validity of taxes. Being valid only if compensatory the charge must be necessarily predicated upon the use made, or to be made, of the highways of the State.
>
> *Clark v. Poor*, 274 U. S., 554; 47 S. Ct., 702; 71 L. Ed., 1199."

In the present Act the amount of the tax is not dependent upon such use. It does not rise with an increase in mileage traveled or even the number of passengers actually carried on the highways of the State. Nor is it related to the degree of wear and tear incident to the use of motor vehicles of different sizes and weights, except insofar as this is indirectly affected by carrying capacity. The tax is proportioned solely by the earning capacity of the vehicle. Accordingly there is here no sufficient relation between the measure employed and the extent or manner of use to justify holding that the tax was a charge made merely as compensation for the use of the highway by interstate buses.

See also, on this point, *Prouty v. Coyne*, 55 F. (2d), 289, decided by a three-Judge District Court of South Dakota in January of this year.

POINTS IV AND V

These points are abandoned, inasmuch as point IV related solely to the appellant Blalock, who has not perfected his appeal, and the Railroad Commission of South Caro-

lina has abandoned any further effort to collect the gross receipts taxes provided for by Section 34 of Act No. 897 of 1932.

POINT VI

All of the arguments heretofore advanced are applicable to this point and further repetition is deemed unnecessary.

CONCLUSION

In accordance with the foregoing, it is respectfully submitted that the decision of the Supreme Court of South Carolina should be reversed, and the statute in question be declared to be unconstitutional and void; at least insofar as it attempts to regulate and relate to contract carriers.

Respectfully submitted,

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APPENDIX A

South Carolina Statute Now Before This Court for Review.	Florida Statute which was held unconstitutional in *Smith v. Cahoon*, 283 U. S. 553; 51 S. Ct., 582; 75 L. Ed., 1101.
Chapter 162, Code of Laws of South Carolina, 1932.	Chapter 13,700, Laws of Florida, 1929.
Act No. 170 of 1925 XXXIV Statutes at Large, 252, as Amended.	(See Compiled General Laws of Florida, Section 1335).
An Act Providing for the Regulation, Supervision, and Control of Persons, Firms, Corporations, and Associations Owning, Controlling, Operating or Managing Motor Vehicles Used in the Business of Transporting Persons or Property for Compensation on the Improved Public Highways of the State, Which Are, or May Hereafter be Declared to be Parts of the State Highway System, or Any of the County Highway Systems, or the Streets of Any City or Town, and Prescribing License Fees and Providing for the Disposition of the Revenue Raised by the Same.	An Act Providing for the Supervision and Regulation of Person, Firms, Corporations and Associations Owning, Controlling, Operating or Managing Motor Vehicles Used in the Business of Transporting Persons or Property for Compensation Over the Public Highways of the State: Defining Auto Transportation Companies and Providing Supervision and Regulation Thereof by the Railroad Commission of the State of Florida and Providing for the Enforcement of the Provisions of this Act and for the Punishment of Violations Thereof Imposing a Mileage Tax and Providing for the Disposition of the Revenue Raised by the same; and Repealing all Acts Inconsistent With the Provisions of this Act.
SECTION 8507. TERMS DEFINED.—(a) The terms "corporation" wherever used in sections 8507 to 8524 means a corporation, company, as-	(1) Definitions: (a) The word "Commission" means the Railroad Commission of this State.

sociation or joint stock association. (b) The term "person" wherever used in sections 8507 to 8524, means an individual, a firm or copartnership. (c) The term "commission" wherever used in sections 8507 to 8524, means the South Carolina Railroad Commission. (d) The term "motor-vehicle carrier" wherever used in sections 8507 to 8524, means every corporation or person, their lessees, trustees or receivers, owning, controling, operating or managing any motor propelled vehicle not usually operated on or over rails, used in the business of transporting persons or property for compensation over any improved public highway or streets as hereinafter defined, in this State. (e) For the purpose of sections 8507 to 8524, all vehicles equipped to carry a load and which are attached to and drawn by a motor vehicle, are hereby defined as trailers, and shall be classed as motor vehicles and subject to the provisions of sections 8507 to 8524. (f) The term "improved public highway" wherever used in sections 8507 to 8524 means every improved public highway in this State which is or may hereafter be declared to be a part of the State Highway System or any county highway system, or the streets of any city or town.

(b) The term "corporation" when used in this Article means a corporation, a company, association, or joint stock association.

(c) The term "person" means an individual, firm or co-partnership.

(d) The word "certificate" means the Certificate of Public Convenience and Necessity authorized to be issued under the provisions of this Article.

(e) The term "public highway" means every public street, road or highway in this State.

(h) The term "auto transportation company" when used in this Article means every corporation or person, their lessees, trustees, or receivers, owning, controlling, operating or managing any motor-propelled vehicle not usually operated on or over rails used in the business of transporting persons or property for compensation, or as a common carrier over any public highway in this State between fixed termini or over a regular route: provided, that the term "auto transportation company" as used in this Article, shall not include corporations or persons engaged exclusively in the transportation of children to or from school, or any transportation company engaged exclusively in the transporting agricultural, horticul-

tural, dairy or other farm products and fresh and salt fish and oysters and shrimp from the point of production to the assembling or shipping point en route to primary market, or to motor vehicles used exclusively in transporting or delivering dairy products or any transportation company engaged in operating taxicabs, or hotel buses from a depot to a hotel in the same town or city. Those passenger buses that operate over a definite route on regular schedules and which are regulated by the legislative body of a city, furnishing public transportation wholly within the corporate limits of any city or between cities whose boundaries adjoin, are hereby expressly excluded from the provisions of this Article.

(g) The words "between fixed termini or over a regular route" when used in this Article means the termini or route between or over which any auto transportation company usually or ordinarily operates any motor vehicle, even though there may be departures from said termini or route, whether such departures be periodical or irregular, whether or not any motor propelled vehicle is operated by any auto transportation company "between fixed termini or over a regular route"

within the meaning of this Article, shall be a question of fact to be determined by the Commission, and the finding of the Railroad Commission thereon shall be final except as to appeal and review as hereinafter provided.

(f) The term "motor vehicle" shall include all vehicles or machines propelled by any power other than muscular used upon the public highways for the transportation of persons or property for compensation as common carriers, except motor vehicles used exclusively in transporting children to or from school, and motor vehicles used by a transportation company engaged exclusively in transporting agricultural, horticultural, dairy or other farm products from the point of production to the primary market, or to motor vehicles used exclusively in transporting or delivering dairy products, or by any transportation company engaged in operating taxicabs, or hotel buses to or from a depot to a hotel in the same town or city.

(i) For the purpose of this Article, all vehicles equipped to carry a load which are attached to and drawn by a motor vehicle are hereby defined as "trailers" and shall be classed as motor

vehicles and subject to the provisions of this Article.

(j) The term "width of tread" means the width of the vehicle measuring from the center of tread of the outside tire to the center of tread of the opposite outside tire.

SECTION 8508. TRANSPORTATIONS BY MOTOR VEHICLE FOR COMPENSATION REGULATED—EXCEPTIONS — PERMITS.—No corporation or person, their lessees, trustees or receivers, shall operate any motor-propelled vehicle as hereinbefore defined for transportation of persons or property for compensation, on any improved public highways in this State, except in accordance with the provisions of Sections 8507 to 8524, and such operation shall be subject to control, supervision and regulation by the commission in the manner provided by Sections 8507 to 8524: *Provided, however,* That nothing in Sections 8507 to 8524 contained shall apply to motor vehicles while used exclusively for transporting persons to and from schools, Sunday schools, churches, or religious services of any kind, or to or from picnics or upon special prearranged excursions, or to United States mail carriers operating star routes, while engaged solely in carrying mail, or to farmers or

dairymen, hauling dairy or farm products; or lumber haulers engaged in transporting lumber and logs from the forest to the shipping points.

SECTION 8509. CERTIFICATE FROM COMMISSION REQUIRED —LICENSE FEE—CLASSES OF CERTIFICATES —ISSUE—HEARING.—No motor vehicle carrier shall hereafter operate for the transportation of persons or property for compensation on any improved public highway in this State without first having obtained from the Commission, under the provisions of Sections 8507 to 8524, a certificate and paid the license fee herein required. The Commission shall have the power to grant six classes of such certificates after application therefor has been made in writing by the owner of such vehicles upon blanks provided by the Commission, and after such hearing as the Commission may deem proper.

To the granting of any certificate the Commission shall hear any objections which may be filed thereto with the Commission by any affected party. The said six classes of certificates shall be respectively designated Certificate A, Certificate B, Certificate C, Certificate D, Certificate E, Certificate F: *Provided, however,* That the Commisison shall grant a certificate as a

(2) Certificates to operate; suspension.

No auto transportation company shall operate any motor vehicle for the transportation of persons or property for compensation on any public highway in this State without first having obtained from the Railroad Commission a certificate that the present or future public convenience and necessity requires or will require such operation, but no certificate shall be required for operation exclusively within the limits of an incorporated city or town.

matter of right where it appears that the applicant was operating in good faith on or before the effective date of Sections 8507 to 8524, but was not operating immediately prior thereto or on said date because of impassable roads.

The Railroad Commission may at any time for a good cause suspend and upon notice to the grantee of any certificate and opportunity to be heard, revoke, alter or amend any certificate issued under the provisions of this section.

SECTION 8510. ISSUE OF DIFFERENT CLASSES OF CERTIFICATES.—* * * The commission shall have power to grant a certificate D for property-carrying vehicles, which will operate upon regular routes and schedules over said highways, and the commission may grant a certificate E for property-carrying vehicles which will not operate upon any particular route or schedule. The provisions of Sections 8507 to 8524 governing the granting of certificates A and C, shall apply to certificates D and E. In the granting of either a certificate A, B, or D, the commission may issue same for partial exercise only of the privileges sought, but without alteration of the license charges fixed thereon. The commission shall have power to grant a certificate F to any person, firm or corpora-

(3) Application for certificate to operate; hearing; contents of certificate.

Application for such certificate of Public Convenience and Necessity shall be made by such corporation, person, firm or association, their lessees, trustees, or receivers to the Railroad Commission; such application shall be in writing verified by the applicant and shall specify the following matters:

1. The name and address of applicant and the names and addresses of its officers, if any.

2. The public highway or highways over which, and the fixed termini or the regular route, if any, between which, or over which applicant intends to operate.

3. The kind of transportation, whether passenger or freight, or both, in which ap-

tion, proposes to engage in the business commonly known as contract hauling of freight or property, and when such applicant does not propose to operate upon a regular schedule or over a regular route, or to solicit or receive patronage along the route.

plicant intends to engage, together with a brief description of each vehicle and motor power which applicant intends to use, including the seating capacity thereof, if for passenger traffic, or tonnage, if for freight traffic, and including the size and weight of such vehicles.

4. The proposed time schedule of operation.

5. The schedule or tariff showing all passenger fares or freight rates proposed to be charged between the several points or localities to be served.

6. Whether or not the said applicant is or has been operating on said routes or other routes in the State, and for what length of time and upon what time schedule of operation and upon what schedule or tariff for passenger fares or freight rates.

Upon filing of said application the Railroad Commission shall fix a time for hearing of said application, which shall not be less than five days nor more than thirty days subsequent to the filing of said application, and no application shall be granted or a Certificate of Convenience and necessity issued without a hearing by the Railroad Commission. Notice of such hearing shall be given to the applicant and to all transportation companies serving any part of the route between the fixed termini and to the

mayor or chief magistrate of each city and town in or through which the applicant desires to operate at least five full days prior to said hearing, which said notice shall recite the fact of the filing of such application, the time and the place of the hearing of the same. A copy of said notice shall be mailed at least five days prior to the time for such hearing to any transportation company holding a Certificate of Public Convenience and Necessity and operating over the route or any part of the route specified in said application. At the time specified in said notice, or at such time as may be fixed by the Commission a public hearing upon said application shall be held by the Commission. At or after such hearing the Commission may issue a Certificate of Public Convenience and Necessity, as prayed for or refuse to issue the same, or may issue the same with modification or upon such terms and conditions as in its judgment the public convenience and necessity may require: Provided, that in granting application for certificate, the Commission may take into consideration the length of time the applicant has operated a scheduled motor vehicle service between the termini named in the application; the general standard of the service maintained during this period; the

reliability of the applicant and his sense of responsibility toward the public as shown during the period of his operation; his court record as well as the effect that the granting of such certificate may have upon other transportation facilities within the territory sought to be served by such applicant, and also the effect upon transportation as a whole within said territory, and any other matters tending to qualify or disqualify him as a common carrier: Provided, that a Certificate of Public Convenience and Necessity shall upon hearing be granted as a matter of right to such Auto Transportation Companies operating in good faith on the 19th day of April, 1929, over the route for which such certificate shall be sought, who shall comply in full with the provisions of this Article.

When application is made by an Auto Transportation Company for a certificate to operate in a territory or on a line already served by a certificate holder under this Article the Commission shall grant same only when the existing certificate holder or holders serving such territory fail to provide service and facilities to the satisfaction of said Commission.

Each Certificate of Convenience and Necessity issued under the provisions of this Article shall contain the fol-

lowing matters:

1. The name of the grantee.

2. The public highway or highways over which, and the fixed termini between which the grantee is permitted to operate.

3. The kind of transportation, whether passenger or freight, or both, in which the grantee is permitted to engage, together with a statement of the number of vehicles to be operated and the maximum seating or tonnage capacity of the vehicle or vehicles which the grantee is permitted to operate.

4. Such additional provisions and limitations as the Commission shall deem necessary or proper to be inserted in the certificate.

No certificate of Public Convenience and Necessity issued under the provisions of this Article may be assigned or transferred without the consent of the Railroad Commission authorizing such transfer.

No certificate shall be issued for the operation on any highway in the State of any motor vehicles of greater width of tread than eighty-four (84) inches and greater loaded weight than eighteen thousand (18,000) pounds, for passenger or freight traffic. The Commission is hereby authorized to prescribe the maximum width of tonneau or body including load of motor vehicles used in either

passenger or freight service, taking into consideration the width of road over which the same is to be operated. And the said Commission is further authorized to suspend temporarily, when the condition of the public highway requires it, the operation of motor vehicles, either for passenger or freight transportation, along and over any public highway of the State, and notice of such suspension shall be given to every holder of a certificate for operation over the said highway and to the public by publication in some newspaper or newspapers in general circulation in the territory of the route.

SECTION 8511. INDEMNITY INSURANCE OR BOND REQUIRED.—The commission shall, in the granting of a certificate, require the applicant to procure and file with said commission liability and property damage insurance, or surety bond with some casualty or surety company authorized to do business in this State, on such motor vehicle or vehicles to be used in the service aforesaid, in such amount as the commission may determine, insuring or indemnifying passengers or cargo and the public receiving personal injury by reason of any act of negligence, and for damage to property of any person other than the assured; such policy or bond to contain such

(4) Bonds required to be given.

The Commission shall, at the time of granting a certificate to operate any transportation company for transporting persons or property, fix and determine the amount of the bond to be given by the applicant for the protection, in case of passenger vehicle, of the passengers and baggage carried in said vehicle and of the public against injury caused by negligence of the person or corporation operating the said vehicle, and in the case of the vehicle transporting freight, for the protection of the said freight so carried and of the public against injuries received through negligence of the per-

conditions, provisions, and limitations as the commission may prescribe and the same shall be kept in full force and effect, and failure to do so shall be cause for the revocation of such certificate: *Provided, however,* That said motor carriers shall be responsible for loss or damage to baggage only when checked with the operator of the vehicle: *Provided, further* That no applicant for a certificate C shall be required to file a bond not exceeding the sum of one thousand ($1,000.00) dollars: *Provided,* That in case the owner of the operated motor carrier is a resident of the State or is a domestic corporation, action may be brought against such party in any county through which the motor carrier operated. In case of non-resident or foreign corporations action may be brought in any county of the State: *Provided, further,* Jurisdiction may be acquired by service of two copies of the summons and complaint upon the secretary of the railroad commission, who shall forthwith transmit one copy by mail to the last known address of the defendant or one of the defendants, if there be more than one.

son or corporation operating said freight carrying vehicle; and it shall be the duty of the applicant to procure and file with the Commission the said bond for liability and property damage, including loss of baggage when same has been checked in accordance with the rules prescribed by the Commission, giving the said bond or bonds in a surety company authorized to do business in the State of Florida, or deposit, in lieu of said surety bonds, bonds of the United States Government or of any city or county in the State of Florida approved by the said Commission. The said bonds shall be conditioned to indemnify passengers and the public receiving personal injuries by any act of negligence, and for damages to property of any person other than the assured; and such bonds shall contain such conditions, provisions, and limitations as the Commission may prescribe, and said bonds shall be payable to the State of Florida, and shall be for the benefit of and subject to action thereon by any person or persons who shall have sustained an actionable injury protected thereby, notwithstanding any provisions in said bonds to the contrary, and every bond or insurance policy given shall be conclusively presumed to have been given according to and to contain all

of the provisions of this Article. And no certificate shall be valid until such bond has been filed and approved and no such bond so accepted shall be cancelled by the Company issuing the same except upon ten days' notice to the Commission; and upon such notice being given by the company issuing said bond or bonds, the certificate of the person or corporation giving bond shall be revoked, unless a new bond shall be filed and accepted before the date for the cancellation of the said bond: Provided, however, that the applicant may, in the discretion of the Commission, be allowed to file in lieu of bond an insurance policy which shall be approved by the Commission, with some casualty company or insurance company or casualty or insurance carrier authorized to do business in the State of Florida.

SECTION 8512. APPLICATIONS — LICENSE FEES. — Every motor vehicle carrier now operating, or which shall hereafter operate in this State, shall, as soon as such certificate is issued, and annually on or before each succeeding January 1st as long as such certificate remains in force, present same, with any changes which have been made therein by the commission, to the "State Official" according to the method and provision prescribed by law

(14) Mileage Tax. Books and forms of account.

There shall be collected by the Comptroller of the State from every auto transportation company as herein defined to which has been granted a Certificate of Public Convenience and Necessity permitting it to engage in the transportation of passengers or freight, or both, a mileage tax of one-half cent per mile on all buses with a capacity of 10 passengers or less and a mileage tax of

for owners of all motor vehicles to make an application in writing for registration and license, and state in said application, beside the other matters by law prescribed, the following: * * *

In case of application for certificate D, the applicant shall state in said application, besides the other matters by law provided, the carrying capacity as given by manufacturer of such motor vehicles; the route on which said motor vehicle is to be used; whether reserve or substitute cars are maintained by the applicant to be used only in emergencies, and, if so, the number of such reserve and substitute cars and a complete description of each, and when in use same to be designated by a special marker to be furnished by the commission; the length of the route in miles on improved public highways in this State; the weight of the vehicles when empty; the schedule under which it shall operate during the ensuing year. And for all such motor vehicles the following annual fees shall be paid to the commission for license issued by it, and no other additional license fee or license tax shall be charged the motor vehicle carrier by the State; nor shall any city, town or county impose a license fee or license three-fourths cent per mile on all buses with a capacity of not more than 20 passengers nor less than 10 passengers and a mileage tax of one cent per mile on all buses of the capacity of more than 20 passengers; and a mileage tax of one cent per mile on all trucks with a loaded capacity of less than 5,500 lbs. and a tax of two cents per mile on all trucks with a loaded capacity of 5,500 lbs. or more coming within the terms of this Article, for every mile traveled by the motor vehicles of such auto transportation company over the public highways of this State. This tax shall be paid quarterly beginning October 1, 1929; Provided, that at the time of issuing said Certificate of Public Convenience and Necessity and at the beginning of each calendar quarter thereafter the Comptroller of the State shall collect from each holder of such certificate the sum of Seventy-five Dollars, as an advance payment upon the mileage tax herein levied for the ensuing quarter which said amount shall at the end of the quarter be credited to said holder of such certificate and the difference between the said amount and the correct amount of said tax shall be adjusted by the Comptroller with the said holder of such certificate.

tax on such motor-vehicle carrier.

Class X. Motor vehicles weighing three tons or less, including carrying capacity, shall each be charged and pay one-eighth of a cent per each ton mile multiplied by the total number of miles that said application shall show will be travelled by such motor vehicle over the improved public highways of this State during the year for which said license is issued.

Class Y. Motor vehicles weighing over three tons and not over five tons if equipped with solid tires, not more than seven tons if equipped with pneumatic tires, including carrying capacity, shall each be charged and pay one-quarter of a cent per each ton mile, multiplied by the total number of miles that said applicant shall show will be travelled by such motor vehicle over the improved public highways of this State during the year for which said license is issued.

Class Z. Motor vehicles weighing over five tons and not over eight and one-half tons if equipped with solid tires, nor more than nine tons if equipped with pneumatic tires, including carrying capacity, shall each be charged and pay one-half of a cent per each ton mile, multiplied by the total number of miles the said applicant shall show will be travelled by such motor vehicle over the improved public highways of this State during the year for which said license is issued.

In order to ascertain the bus mileage of every passenger bus and the truck mileage of every freight truck traveled by the holders of certificates for such purpose the Comptroller of the State shall prescribe the books and forms of accounts to be kept by the said holder of such certificate and at the end of each current month the said holder of a certificate shall file with the Comptroller, and a duplicate thereof with the Commission, a statement verified by an officer, if the holder of such certificate is a corporation, or if the holder of such certificate is a person then by such person, showing the mileage made by said holder of such certificate during the said month: Provided, further, that the mileage tax provided for in this section shall be in lieu of all other taxes and fees of every kind, character and description, except ad valorem taxes levied upon the property of such auto transportation companies and except the gasoline tax and except the motor vehicle license tax as now provided for in section 1285; said motor vehicle license tax to be paid into the State Treasury and disposed of as provided for in Section 1304. The books and records of all auto transportation companies shall be at all times open to inspection of

plication shall show will be travelled by such motor vehicle over the improved public highways of this State during the year of which said license is issued: *Provided,* That the minimum fees for vehicles hereunder shall be as follows: For vehicles of not over one ton carrying capacity, twenty-five ($25.00) dollars; for vehicles of carrying capacity of over one ton and not more than two tons, fifty ($50.00) dollars; for vehicles of carrying capacity of over two tons and not over three tons, one hundred ($100.00) dollars; for vehicles of carrying capacity of over three tons, and not over four tons, one hundred fifty ($150.00) dollars; for vehicles of carrying capacity of over four tons and not over five tons, two hundred fifty ($250.00) dollars, if equipped with pneumatic tires; if equipped with solid tires these minimum fees shall be doubled. Property-carrying vehicles, equipped with solid tires, weighing over eight and one-half tons, including carrying capacity, shall not be licensed. The provisions of Sections 8507 to 8524 as to motor vehicles carrying property shall not apply to baggage of passengers being transported by holders of certificates A, B, and C.

The holders of certificates E and F shall annually on or the Comptroller of the State and of the Commission, or any agent by them appointed for such purpose, and if the said holder of such certificate shall fail to make the monthly reports herein prescribed to the Comptroller and to the Commission, or shall fail to keep said books and records as prescribed by said Comptroller of the State, then upon notice in writing to said holder of such certificate of such default or defaults and the failure of the said holder of such certificate within five days to make said statements or to keep said records properly the certificate shall be revoked by the Commission, but the Commission shall, if requested by the said holder of such certificate, order a hearing upon the question of the revocation of such certificate. The Comptroller of the State shall keep a true and accurate list of all auto transportation companies to whom certificates shall be issued with the post office address of each.

before January 1st of each year pay to the commission the following fees: for vehicles of carrying capacity of not over one and one-half tons, thirty ($30.00) dollars; for vehicles of carrying capacity of over one and one-half tons and not over two tons, sixty ($60.00) dollars; for vehicles of carrying capacity of over two tons and not over three tons, one hundred twenty ($120.00) dollars; for vehicles of carrying capacity of over three tons and not over four tons, two hundred ($200.00) dollars; for vehicles of carrying capacity of over four tons and not over five tons, four hundred ($400.00) dollars; for vehicles equipped fully with pneumatic tires. For vehicles equipped fully or partially with solid tires these fees shall be doubled.

The fees required of holders of certificates C, E, and F, shall be in addition to any license tax, or license fee charged by any municipality. The provisions prohibiting the additional tax or license fee as provided for holders of certificates A, B, and D, shall not apply to classes C, E, and F. The fees herein, however, shall be in lieu of all other State license fees. *Provided*, That on and after January 1, 1931, the fees prescribed in this section may be paid semi-annually in advance on

or before January 1st and July 1st of each year, *Provided, however,* That the provisions hereof shall not be taken or held to repeal Section 7385 or to repeal Section 8530.

SECTION 8516. POWERS OF COMMISSION.—The commission is hereby vested with power and authority and it shall be their duty to supervise and regulate every motor carrier in this State; to fix or approve the rates, fares, charges, classification and rules and regulations pertaining thereto, of each such motor carrier: *Provided, however,* That the rate now obtaining by the respective motor carriers shall remain in effect until such time, when pursuant to complaint and proper hearing, the commission shall have determined that said rate or rates are unreasonable: *Provided,* That the said commission shall fix as to class certificate C a maximum rate only.

(5) Powers of Railroad Commission.

The Railroad Commission of the State of Florida is hereby vested with power and authority to supervise and regulate every auto transportation company in the State, to fix or approve the rates, fares, charges, classifications, rules and regulations for each auto transportation company, to regulate the service and safety of operations of each such auto transportation company; to prescribe a uniform system and classification of accounts to be used, which among other things, shall set up adequate depreciation charges; to require the filing of annual and other reports and all other data by said auto transportation companies; and to supervise and regulate auto transportation companies in all other matters affecting the relationship between such companies and the traveling and shipping public. The Commission shall have power and authority by order to prescribe rules and regulations applicable to any and all such auto transportation companies. The Commis-

sion, in the exercise of the jurisdiction conferred upon it by this Article, shall have power and authority to make orders and prescribe rules and regulations affecting such auto transportation companies notwithstanding the provisions of any ordinance or permit of any incorporated city or town, city and county, or county, or village, and in case of conflict between any such order, rule or regulation, any such ordinance or permit, the order, rule or regulation of the Commission shall in each instance prevail. No municipality shall have the right to require such auto transportation company to furnish any bond or insurance policy, or pay any license, fee or tax except as herein provided.

(6) Schedule of rates, fares, etc., to be filed with Railroad Commission.

Upon the taking effect of this Article, it shall be the duty of every such auto transportation company to forthwith file with its application for a certificate of public convenience and necessity a schedule of its rates and fares, and a time schedule of all motor vehicles operated, all of which shall be kept on file by the Commission, subject to public inspection. The Commission shall require each auto transportation company to keep open for

public inspection at designated offices so much of said schedule of rates and fares and time schedules as it deems necessary for the public information.

Whenever such rates or fares or time schedules are found to be unreasonable, the Commission, upon its own motion, or upon complaint, shall upon hearing as herein provided, prescribe reasonable rates and time schedules to take the place of those found unreasonable, and such new rates shall be filed in place of the rates of schedules superseded. No rates or time schedules filed with the Commission shall be changed by any such auto transportation company without an order of the Commission sanctioning the same. It shall be unlawful for any transportation company to collect or receive a greater or less rate or charges for any service rendered by it than the transportation charge made in the schedules on file with the Commission, and no new rates shall take effect until the date named by the Commission.

SECTION 8517. USE OF FEES COLLECTED— APPORTIONMENT —DISTRIBUTION.—It shall be the duty of the railroad commission to keep a separate account of all moneys collected under this chapter and any and all moneys so collected

(15) Comptroller to keep separate account of collections.

It shall be the duty of the Comptroller of the State to keep a separate account of all moneys collected under this Article and any and all mon-

shall be paid into the State Treasury monthly. Each of the payments aforesaid shall be accompanied by a statement showing the amount collected for the use of the roads comprising the State Highway System, and the amount collected for the use of the roads comprising the county highways systems of each county, and the streets of each city or town; the amount in each case to be computed upon a mileage basis. The amount so remitted which was collected for the use of the State Highway System shall be placed to the credit of the State Highway Fund, and the amount so remitted which was collected for the use of the county highways systems and the streets of cities or towns shall be s e m i - annually distributed among and paid to such counties, cities or towns which maintain such highways or streets over which said motor vehicles shall operate, as shown by such statement to be entitled thereto; said payments to be made on warrants of the State Auditor to the respective treasurers of the counties, cities or towns: *Provided,* In such distribution there shall be deducted the proportionate cost of administration of Sections 8507 to 8524.

eys so collected after deducting the necessary expenses incurred by the Comptroller of the State in carrying out the provisions of this Article shall be paid to the State Treasurer monthly. The State Treasurer shall credit the Railroad Commission fund with five per cent (5%) of the moneys so collected and paid to him to cover the expenses of the administration of this Article by the said Commission, and shall distribute the balance as follows: To each county whose highway system is used as a part of the route authorized in the Certificate of Public Convenience and Necessity issued to any auto transportation company its part of said balance in the proportion that the bus mileage traveled over its highway system bear to the entire bus mileage traveled by the motor vehicle of said auto transportation company; such amounts shall be quarterly remitted to the County Commissioners of each of said respective counties by warrant of the Comptroller on the State Treasurer, in like manner as other payments by State warrants are made, to be paid by the said County Commissioners to the bond trustees of the county bonds, to be used by said trustees to pay the interest on and provide a sinking fund to retire

the county bonds issued for the purpose of constructing the State system or the county system of good roads within said county or to be used by said county commissioners for said purpose.

(16) Permission to employ clerks and inspectors.

The Commission shall employ such necessary clerks, inspectors and employees on such terms and conditions as said Commission shall deem advisable and necessary to carry out the provisions of this Article.

SECTION 8518. REVOCATION, ETC., OF CERTIFICATES.—The commission may, at any time, by its order, duly entered after a hearing had upon notice to the holder of any certificate hereunder, and an opportunity to such holder to be heard, at which time it shall be proved that such holder has wilfully made any misrepresentation of a material fact in obtaining a certificate, or wilfully violated or refused to observe the laws of this State touching motor-vehicle carriers or any of the terms of his certificate, or any of the commission's proper orders, rules or regulations, suspend, revoke, alter or amend any certificate issued under the provisions of Sections 8507 to 8524; but the holder of such certificate shall have the right of appeal to any court of com-

(7) Violation of laws, regulations, etc.

The Commission may upon complaint, or upon its own motion, that any auto transportation company is violating the provisions of this Article or any of the rules or regulations prescribed by the Commission, or is violating any of the laws of the State, or any requirement of its certificate of Public Convenience and Necessity, issue its order to the said auto transportation company notifying it to appear before the Commission at a fixed time and place, at which time and place the Commission shall investigate the complaint made, and if it shall be satisfied after such hearing that the said auto transportation company holding a certificate has wilfully violated or refused to observe

petent jurisdiction; *Provided, however,* That a certificate when once granted by the commission shall not hereafter be suspended, revoked, altered or amended for any other cause than stated in Sections 8507 to 8524.

the laws of this State touching motor vehicles or any of the terms of the certificate issued to the said auto transportation company, or any of the Commission's orders, rules or regulations, the said Commission may suspend, revoke, alter, or amend any certificate issued under the provisions of this Article to the said auto transportation company; but the holder of such certificate shall have the right to appeal to the Supreme Court of the State as is now provided by law for appeals from orders relating to railway or street railway corporations.

(8) Rules and regulations made by Commission within powers.

Every rule, regulation, decision, order or requirement made by the said Commission under the provisions of this Article shall be deemed and held to be within its jurisdiction and powers, and to be reasonable and just and such as ought to have been made in the premises, and to have been properly made and arrived at in due form of procedure, and such as can and ought to be executed, unless the contrary plainly appears on the face thereof or can be made to appear by clear and satisfactory evidence, and shall not be set aside or held invalid unless the contrary so appears. All presumption

shall be in favor of every action of the said Commission and all doubts as to its jurisdiction and powers shall be resolved in its favor. If, in any proceeding to enforce or to attack any rules, regulations, decisions or orders, any part thereof shall be found invalid the Court shall proceed to enforce such portion thereof as may be valid if the same can be done.

(9) Practice, procedure and evidence in proceedings before Commission.

In all matters of practice and procedure, and all matters of evidence and the rules of evidence and all matters involving the effect of evidence in proceedings before the Commission under the provisions of this Article, and in proceedings by the said Commission to enforce its rates, rules, regulations, decisions, orders and requirements made hereunder, and in proceedings against the said Commission in relation to rates, rules, regulations, decisions, orders and requirements prescribed by it, all provisions of law now existing or which may from time to time be prescribed for observance in like cases arising under the law for the regulation of railroads, railroad companies and common carriers, shall govern and control.

(10) Judicial Powers of Commission.

The Commission shall, so far as the constitution of this State permits, exercise all such judicial powers as may be necessary to enable it to enforce or perform any duty, power or function conferred on it by this Article.

(11) Rate of speed in operation of motor vehicles.

No Auto Transportation Company shall operate any motor vehicle on the public highways of this State at a speed in excess of the speed now permitted by the laws of this State, but motor vehicles used exclusively for carrying of passengers may be operated at any rate not exceeding forty-five (45) miles per hour.

(12) Departure from regular route in operation of motor vehicles.

An auto transportation company holding a Certificate of Public Convenience and Necessity as provided for in this Article may depart from the route described in such certificate if compelled to detour on account of the closing of roads, or for the purpose of transporting chartered or excursion parties to points not on such route, and not exclusively on a route served by any other certificate holder, and may receive for such service compensation as may be agreed upon between

SECTION 8520. OPERATION WHILE UNDER INFLUENCE OF LIQUOR OR DRUGS—FAILURE TO GIVE HALF OF ROAD—REVOCATION OF LICENSE.—Every officer, agent, or employee, of any corporation and every other person who wilfully violates or fails to comply with, or who procures, aids or abets in the violation of any provision of Sections 8507 to 8524 or who fails to obey, observe or comply with any lawful order, decision or rule or regulation, direction, demand or requirement of the Commission or any part or provision thereof, or who has operated any motor vehicle for the transportation of persons or property for compensation while under the influence of intoxicating liquors or drugs, or in such a reckless manner or at such rate of speed as would endanger the passengers or any other person along such highway or shall fail to give half the road on meeting a vehicle, shall be guilty of a misdemeanor and punishable by a fine of not less than Twenty-five ($25.00) Dollars nor exceeding One Hundred ($100.00) Dollars, or imprisonment for not less than ten (10) days nor more than thirty (30) days.

SECTION 8521. SECTIONS INDEPENDENT.—If any section, the carrier and the party or parties so served.

(13) Every officer, agent or employee of any corporation and every other person who violates or fails to comply with, or who procures, aids, or abets in the violation of any provision of this Act, or who fails to obey, observe or comply with any order, decision, rule or regulation, direction, demand or requirement, or any part or provision thereof, or who fails to observe any regulation as to maximum speed of operation or maximum weight of load, of the Railroad Commission or who procures, aids, or abets any corporation or person in his failure to obey, observe or comply with any such order, maximum speed of operation, maximum weight of load, decision, rule, direction, demand, or regulation, or any part or provision thereof, is guilty of a misdemeanor and is punishable by a fine not exceeding Five Hundred Dollars ($500.00) or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment. (Section 7794 (2) Compiled General Laws of Florida, 1930 Supplement.)

sub-section, sentence, clause or phrase of Sections 8507 to 8524 is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portion of Sections 8507 to 8524.

SECTION 8522. SECTIONS NOT APPLICABLE UNLESS TRANSPORTATION A BUSINESS. —Nothing contained in Sections 8507 to 8524 shall be construed to prevent the use or hiring of any motor vehicle for the purpose of making some particular trip, where the owner of such vehicle does not make such transportation a business.

(18) Effect of partial invalidity of law.

If any section, sub-section, sentence, clause or phrase of this law is for any reason held unconstitutional such decision shall not affect the validity of the remaining portions of this law. In case the provisions of this law providing for the distribution among the counties of this state of the balance of the net proceeds of all moneys collected under this Article after the five per cent (5%) thereof has been credited to the Railroad Commission fund, is, for any reason declared or found to be invalid, then in that event such balance of such proceeds above described shall be paid into the State Road License Fund and shall be used for the construction and maintenance of State roads under the direction of the State Road Department.

(19) Rates fixed in tariffs on file to be adhered to.

No auto transportation company shall charge, demand, collect, or receive a greater or less or different compensation for the trans-

portation of persons or property, or for any service in connection therewith, than the rates, fares and charges applicable to such company as specified in its tariffs filed with and approved by the Commission and in effect at the time; nor shall any such company refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified, or extend to any person, firm, copartnership, or corporation, or other organization, or association, privileges or facilities in the transportation of persons or property except such as are regularly and uniformly extended to all; and no such company shall directly or indirectly, issue, give, tender, or honor any free fares except to its bona fide officers, agents, employees and members of their immediate families; provided, that auto transportation companies under the Article may exchange, free transportation within the limits of this section.

(20) Number plates.

Distinguishing number plates shall be prescribed and furnished by the Commission, which plates shall be displayed at all times upon each motor vehicle authorized for operation under this Article, for which the Commission shall charge and each auto transportation

company shall pay a fee of fifty cents each. Transfers of number plates from one vehicle to another are hereby prohibited. The fees derived from the issuance of such number plates shall be paid into the State Treasury to the credit of the Railroad Commission fund.

SECTION 8523. REPEALING CLAUSE.—The provisions of Sections 8507 to 8524 shall not be taken or held to repeal Section 7385. All Acts or parts of Acts inconsistent herewith are hereby repealed to the extent of said inconsistency, but nothing herein contained shall be construed to relieve any motor vehicle as herein defined from any regulation otherwise imposed by law or lawful authority.

SECTION 8525. ADDITIONAL ANNUAL LICENSE FEE REQUIRED OF OWNER OR OPERATOR OF MOTOR VEHICLES ENGAGED IN TRANSPORTING PERSONS OR PROPERTY FOR COMPENSATION.—(1) AMOUNT.—Before operating upon the public highways of this State, every owner or operator of motor vehicles engaged in the business of transporting persons or property for compenstaion on the public highways of the State of South Carolina under the provisions of Sections 8507 to 8524, inclusive, shall, in addition to the license fees imposed by said sections,

SECTION 21. All laws and parts of laws in conflict with the provisions of this Act be and the same are hereby repealed.

pay to the State Highway Department an annual license in an amount equal to or the same as the annual license paid by and required of the owner of motor vehicle under the provisions of Section 5894.

(2) PURPOSE OF THIS SECTION.—It is the purpose of this section that the annual license herein imposed shall be in addition to the license fees imposed by Sections 8507 to 8524.

(3) DISPOSITION OF FUNDS.—All funds derived by the State Highway Department from the provisions of this section shall be credited to the State Highway Fund and used for the construction and maintenance of the State Highway System.

(4) VIOLATION A MISDEMEANOR — PENALTY. — Any person, firm or corporation violating the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than ten ($10.00) dollars nor more than one hundred ($100.00) dollars or be imprisoned not less than ten (10) nor more than thirty (30) days within the discretion of the court.

SECTION 8527. CONTROL OF MOTOR VEHICLES USED FOR HIRE TRANSFERRED TO RAILROAD COMMISSION.—All the powers and duties imposed upon the highway commis-

(17) Operation and effect of law.

Neither this Article nor any provision hereof shall apply or be construed to apply to commerce with foreign na-

sion of the State of South Carolina with reference to the regulation, supervision and control of persons, firms, corporations and associations owning, controlling, operating or managing motor vehicles used for hire under the provisions of Sections 8507 to 8524 are hereby transferred to and devolved upon the South Carolina Railroad Commission. The term "commission" wherever used in said sections shall hereafter mean the South Carolina Railroad Commission.

tions or commence among the several States of the union except insofar as the same may be permitted under the provisions of the Constitution of the United States and the Acts of Congress.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 94

M. D. HICKLIN, INDIVIDUALLY, ETC., AND BLALOCK MOTOR EXPRESS, INC., APPELLANTS,

vs.

J. C. CONEY, EARLE R. ELLERBE, SAM C. BLEASE, ET AL., ETC.

OBJECTIONS TO THE JURISDICTION, WITH MOTION TO DISMISS OR AFFIRM.

JOHN M. DANIEL,
Attorney General of South Carolina,
IRVINE F. BELSER,
Special Counsel,
Counsel for Appellees.

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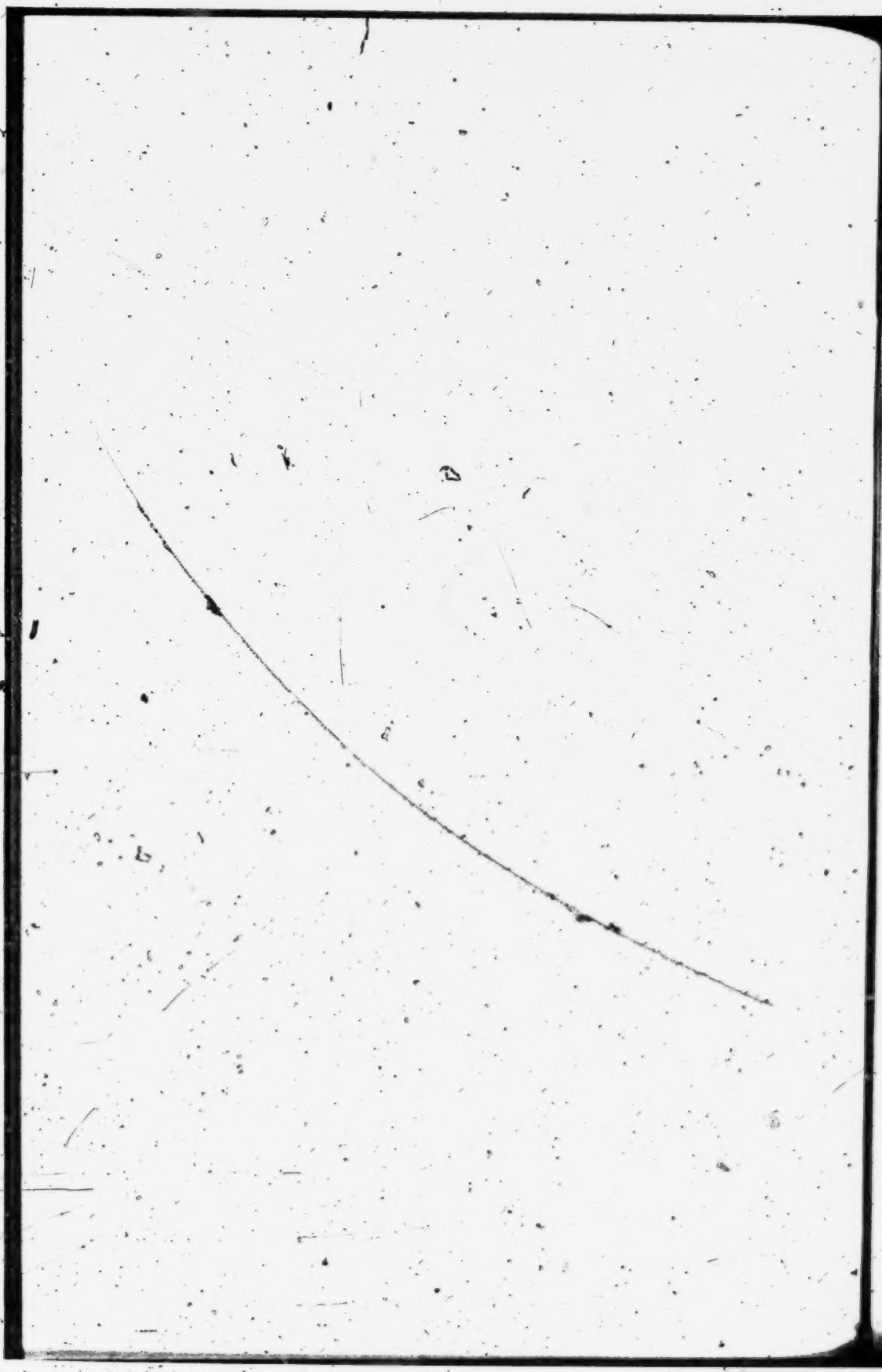

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933.

No. 94

M. D. HICKLIN, INDIVIDUALLY AND AS A REPRESENTATIVE OF CLASS "F" CARRIERS WITHIN THE PROVISIONS OF SECTIONS 8507-8530 OF CHAPTER 162 OF THE SOUTH CAROLINA CODE OF 1932, WHO ARE, OR CLAIM TO BE, ENGAGED IN INTERSTATE COMMERCE, AS WELL AS INTRASTATE OPERATIONS WITHIN THE STATE OF SOUTH CAROLINA, APPELLANT,

vs.

J. C. CONEY, EARLE R. ELLERBE, SAM C. BLEASE, J. H. NANCE, THOMAS H. TATUM, J. A. BEAMGUARD, AND B. J. PEARMAN, AS MEMBERS OF AND CONSTITUTING THE RAILROAD COMMISSION OF SOUTH CAROLINA, APPELLEES.

OBJECTIONS TO THE JURISDICTION, WITH MOTION TO DISMISS OR AFFIRM.

Come now the appellees in the above case and file the following objections to the jurisdiction, together with motion to dismiss the appeal or affirm the judgment:

Statement of Grounds of Objection to the Jurisdiction.

I.

The Blalock Motor Express, Inc., in whose favor an appeal was allowed provided a $500 bond was filed, has failed to file the said appeal bond, and this appeal is now being prosecuted wholly by the appellant, M. D. Hicklin. Hence, the appeal by the Blalock Motor Express, Inc., together with the assignments of error (4) and points particularly relating thereto should be disregarded.

II.

The appellant has failed to comply with this Court's Rule 12, Section 1, requiring the filing of a statement giving particularly the points to be relied upon to sustain the jurisdiction.

The appellant in this case has filed two statements along this line, one entitled "Statement as to Jurisdiction of Court", and thereafter another paper served on May 23, 1933, purporting to designate the points to be relied upon. It is submitted, however, that neither paper adequately or sufficiently complies with this Court's said rule or the purpose thereof.

Points 1, 2 and 3 contained in the statement of points dated May 23, 1933, fail to specify particularly what sections of the Act in question are alleged to be unconstitutional, and wherein or how the said Act violates the provisions of the United States Constitution therein mentioned.

The South Carolina Motor Regulatory Act, as embodied in the South Carolina Code of 1932, pp. 954-962, consists of eighteen different sections comprising eight printed pages, and it is impossible for the Court or counsel to tell from the generality of these points what are the particular

sections to which exception is taken. Moreover, the Act itself provides (Sec. 8521) that if any section or portion thereof should be held to be unconstitutional, such decision should not affect the validity of the remaining portions of the Act.

As to the remaining points, 4, 5 and 6, point 4 relates solely to the questions involved in the Blalock Motor Express, Inc., appeal which has been abandoned, and not to the appeal in this case, and point 5(*a*) is subject to the objections hereinabove stated with regard to points 1, 2 and 3, and point 5(*c*) seeks to raise an issue which was not raised in the answer filed in the case or in the argument before the South Carolina Supreme Court, or in any of the assignments of error.

Point 6 is merely a general statement and does not specify particularly any errors on the part of the Supreme Court of South Carolina.

Statement of Grounds of Motion to Affirm.

In any event it is submitted that the appellant's grounds of appeal are so unsubstantial that the judgment of the South Carolina Supreme Court should be affirmed without further hearing.

I.

The most seriously pressed question raised by the appellant before the South Carolina Supreme Court was that the said Act was unconstitutional by reason of the exemption contained in Section 8508 of the Act in favor of "farmers or dairymen hauling dairy or farm products".

It is submitted, however, that the Supreme Court of South Carolina was fully justified by reason of the recent decisions of this Honorable Court in holding that said exemption did not render the Act unconstitutional.

Stephenson v. *Binford,* 77 L. ed. 203, — U. S. —;
Baking Company v. *Woodring,* 286 U. S. 352, 52 S. Ct. 595, 76 L. ed. 816;
Buck v. *Kuykendall,* 267 U. S. 307, 69 L. ed. 623;
Packard v. *Banton,* 264 U. S. 140, 68 L. ed. 596;
Sproles v. *Binford,* 286 U. S. 374, 76 L. ed. 827;
Cf. *Smith* v. *Cahoon,* 283 U. S. 553, 75 L. ed. 1264.

The record in this case established that farmers and/or dairymen used the highways of the State only seasonally, during the harvest seasons of the year, that is during a few summer months and a few fall months, and that the use made by them is very light and insignificant as compared with the use made by appellant and others in like situation, operating fleets of large and heavy trucks from one end of the State to the other. It was also established that the Railroad Commission, which was charged with the duty of enforcing the Act, construed the exemption as running in favor only of farmers and dairymen whose principal business was farming and dairying and not in favor of farmers or dairymen who made a regular business of transport hauling for others. (See Reply and Affidavit of W. W. Goodman.)

> "It is well established law that the highways of the State are public property; that their primary and preferred use is for private purposes; and that their use for purposes of gain is special and extraordinary, which, generally at least, the Legislature may prohibit or condition as it sees fit. *Packard* v. *Banton,* 264 U. S. 140, 144, 68 L. ed. 596, 607, 44 S. Ct. 257, and cases cited; *Frost & F. Trucking Co.* v. *Railroad Commission,* 271 U. S. 583, 592, 593, 70 L. ed. 1101, 1104, 1105, 47 A. L. R. 457, 46 S. Ct. 605; *Hodge-Drive-It-Yourself Co.* v. *Cincinnati,* 284 U. S. 335, 337, 76 L. ed. 323, 326, 52 S. Ct. 144; *Johnson Transfer & Freight Lines* v.

Perry (D. C.) 47 F. (2d) 900, 902; *Southern Motorways* v. *Perry*, (D. C.) 39 F. (2d) 145, 147; *People's Transit Co.* v. *Henshaw* (C. C. A. 8th) 20 F. (2d) 87, 89; *Weksler* v. *Collins*, 317 Ill. 132, 138, 139, 147 N. E. 797; *Main Motor Coaches* v. *Public Utilities Commission*, 125 Me. 63, 65, 130 Atl. 866".

Stephenson v. *Binford, supra.*

On this point the South Carolina Supreme Court used the following language:

"It must be conceded, as has been held in *German Alliance Insurance Co.* v. *Kansas*, 233 U. S. 389, that even though an exemption operates as a discrimination it is not necessarily invalid; and, also, as is generally held, that a classification or discrimination should be allowed to stand unless it is entirely arbitrary. Unquestionably, the use by farmers and dairymen for the transportation of farm and dairy products is seasonal and involves only a moderate use of the highways; and the exemption here is further limited by the fact that it can apply only to one whose principal business is that of a farmer or dairyman and not to one merely incidentally engaged in farming or dairying. As pointed out in the Woodring case, there is a practical difference between such use of the highways and that made by the respondents in this case, "who operate fleets of trucks in the conduct of their business and who use the highways daily in the delivery of their products to their customers", the Court holding, as we have seen, that the Legislature in making its classification was entitled to consider frequency and character of use, etc. In addition, there is this material consideration, that farming and dairying lie at the foundation of our economic structure and are essential to the public welfare.

We think the respondents have failed to sustain the burden cast upon them of showing beyond a reasonable doubt that the exemption in question renders the act unconstitutional and invalid."

This language is substantially identical with that used by this Honorable Court in the above cited *Baking Company* v. *Woodring* case, as follows:

> "The Legislature knew", said the Court, "that as a matter of fact farm products are transported to town by the farmer, or by a nonexempt 'contract carrier' employed by him. The Legislature knew that as a matter of fact the use of the highways for the transportation of farm products by the owner is casual and infrequent and incidental; farmers use the highways to transport their products to market ordinarily but a few times a year. The Legislature rightly concluded that the use of the highways for carrying home his groceries in his own automobile is adequately compensated by the general tax imposed on all 'motor vehicles'. 55 F. (2d) at page 352. And the Court properly excluded from consideration mere hypothetical and fanciful illustrations of possible discriminations which had no basis in the actual experience to which the statute was addressed. The court found a practical difference between the case of the appellants 'who operate fleets of trucks in the conduct of their business and who use the highways daily in the delivery of their products to their customers', and that of 'a farmer who hauls his wheat or livestock to town once or twice a year'. The Legislature in making its classification was entitled to consider frequency and character of use and to adapt its regulations to the classes of operations, which by reason of their habitual and constant use of the highways brought about the conditions making regulation imperative and created the necessity for the imposition of a tax for maintainance and reconstruction. As the Court said in *Alward* v. *Johnson*, 282 U. S. 509, 513, 514, 51 S. Ct. 273, 274, 75 L. ed. 496, 75 A. L. R. 9: 'The distinction between property employed in conducting a business which requires constant and unusual use of the highways and property not so employed is plain enough'. See also *Bekins Van Lines* v. *Riley*, 280 U. S. 80, 82, 50 S. Ct. 204, 74 L. ed. 704, 68 A. L. R. 194".

It is apparent that the case of *Smith* v. *Cahoon*, 283 U. S. 553, 75 L. ed. 1264, may be distinguished from the case at bar as it was by the Supreme Court, in that the exemptions there ran in favor of any "transportation company" hauling the class of products therein mentioned, whereas in the case at bar the discrimination is limited not only by the class of products in question but by the occupation of those engaged in hauling said products, to-wit: farmers and dairymen and lumber haulers. It is obvious that the distinction in favor of a class of carriers, such as farmers and dairymen, is a valid distinction, and is based upon practical considerations as well as fundamental principles of public policy as was indicated in the foregoing decision of this Honorable Court.

II.

The points sought to be raised by the answer (Par. 7) and also in the statement as to the jurisdiction, in regard to (*a*) cargo insurance, and (*b*) in regard to the commission being charged with the duty to regulate the rates and fares of appellant and others in like situation, may be sufficiently disposed of by reason of the fact that there was no showing that the Commission had ever undertaken to enforce the said provisions of the Act as against the appellant or others in like situation—in fact it was conceded in the Answer (see Par. 7) that the Commission had never undertaken to regulate appellant's rates or charges.

> "So far as appears no attempt yet has been made to enforce the provision against any of these appellants, and until that is done they have no occasion to complain."
>
> *Stephenson* v. *Binford*, 77 L. ed. 203 at 214; U. S. Supreme Ct. Adv. Opinions No. 4.

Moreover, as to the matter of cargo insurance the Supreme Court of South Carolina specifically held (see Part 2 of the Opinion) that the said section of the Complaint (8511) with regard to cargo insurance did not apply to the appellant and did not authorize the Commission to require the appellant to furnish such cargo insurance.

It is established by authorities too numerous to mention that the decision of the State Supreme Court construing a State statute will be accepted as final and conclusive by this Honorable Court, and hence this decision of the South Carolina Supreme Court removes the grounds of this complaint against the statute.

III.

As to the point which we assume is intended to be made by Point 3, to the effect that under Section 8512 of the Act the license fees are based wholly on carrying capacity, it is submitted that it is sufficient to point out that this point was not raised by the appellant's answer, and hence should not be considered by this Court, under the established principle that constitutional objections must be raised at the first opportunity.

The point, however, was raised by argument in the State Supreme Court and was, it is submitted, manifestly properly disposed of by the South Carolina Supreme Court in its decision in Part III thereof.

In regard to this the South Carolina Supreme Court said:

> "We have made a careful examination of the authorities with reference to this particular contention and think it is without merit. Such fees are collected, as provided for by section 8517, for the purpose of maintaining the public highways over which such motor vehicles shall operate, as compensation for their use. Further, they are reasonable as to amount and tend to contribute

to the protection of the highways. We do not think that the provision of the act here complained of constitutes an undue burden on interstate commerce."

It is submitted that this decision of the South Carolina Supreme Court is fully supported by the above cited and many other decisions of this Honorable Court.

> "A State which, at its own expense, furnishes special facilities for the use of those engaged in intrastate and interstate commerce may exact compensation therefor, and if the charges are reasonable and uniform, they constitute no burden on interstate commerce. *Hendrick* v. *Maryland*, 235 U. S. 610, 622, 59 L. ed. 385, 390, 35 Sup. Ct. Rep. 140; *Kane* v. *New Jersey*, 242 U. S. 160, 167, 71 L. ed. 222, 226, 37 Sup. Ct. Rep. 30. Such regulations are deemed to be reasonable and to affect interstate commerce only incidentally and indirectly."
>
> *Michigan Public Utilities Commission* v. *Duke*, 266 U. S. 570, 45 S. Ct. 191, 69 L. ed. 445, 36 A. L. R. 1105.

It is settled that the State may impose taxes upon the intrastate operations of a motor carrier though such motor carrier is also engaged in interstate operations.

Interstate Busses Corporation v. *Blodgett*, 276 U. S. 245, 72 L. ed. 551.

In a case of this sort the burden is upon the plaintiff to show that in actual practice the tax operates to deprive him of his constitutional rights.

See *Interstate Busses Corporation* v. *Blodgett, supra.*

As was said by the Court in the above cited Continental Baking Case the court should exclude "from consideration mere hypothetical and fanciful illustrations of possible discriminations which had no basis in the actual experience to which the statute was addressed".

Advance Op. 76 L. ed., p. 826.

The Federal Supreme Court must indulge the presumption until the contrary is made to appear that the state will not so construe or enforce the order as to interfere with or obstruct such commerce. Ohio Tax Cases, 232 U. S. 576, 591, 58 L. ed. 738, 745, 34 Sup. Ct. Rep. 372; *St. Louis Southwestern R. Co.* v. *Arkansas,* 235 U. S. 350, 369, ante, 265, 274, 35 Sup. Ct. Rep. 99.

Michigan C. R. Co. v. *Michigan R. Commission,* 236 U. S. 615, 35 Sup. Ct. Rep. 422, 59 L. ed. 750, at page 758.

IV.

As to the point sought to be raised by this point, 5(*c*), it is submitted it is sufficient to point out that this point was not raised in the Answer nor presented in any form to the South Carolina Supreme Court. Indeed this alleged point was beyond the scope of the issues in this case since the suit itself was brought, as was stated in the petition (Par. 7) for the purpose of enforcing the Motor Regulatory Act of 1932 (8507 through 8530, Chap. 162 of the 1932 Code), and did not in any way relate to the Act mentioned in said point, to-wit: Section 897 of the 1932 Code, which was the General Appropriation Act for that year.

The point suggested in point 4(*b*) as to the tax upon the gross receipts covering interstate as well as intrastate business, related solely to the appeal in the Blalock case (see Assignment of Error IV), hence need not be considered by this Court in this case in view of the abandonment of the appeal in the Blalock case.

For the foregoing reasons it is respectfully submitted that the appeal in this case should be dismissed and/or

the judgment of the South Carolina Supreme Court affirmed.

JOHN M. DANIEL,
Attorney General,
IRVINE F. BELSER,
Special Counsel,
For the State of South Carolina.

Columbia, S. C.
26 August, 1933.

Supreme Court of the United States

OCTOBER TERM, 1933

No. 94

M. D. HICKLIN, INDIVIDUALLY, AND AS A REPRESENTATIVE OF CLASS "F" CARRIERS WITHIN THE PROVISIONS OF SECTIONS 8507–8530 OF CHAPTER 162 OF THE SOUTH CAROLINA CODE OF 1932, WHO ARE, OR CLAIM TO BE, ENGAGED IN INTERSTATE COMMERCE, AS WELL AS INTERSTATE OPERATIONS WITHIN THE STATE OF SOUTH CAROLINA, APPELLANT,

versus

J. C. CONEY, EARLE R. ELLERBE, SAM C. BLEASE, J. H. NANCE, THOMAS H. TATUM, J. A. BEAMGUARD AND B. J. PEARMAN, AS MEMBERS OF AND CONSTITUTING THE RAILROAD COMMISSION OF SOUTH CAROLINA, APPELLEES.

ARGUMENT FOR APPELLEES

JOHN M. DANIEL,
Attorney General.
IRVINE F. BELSER,
Special Counsel.
Attorneys for Appellees.

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INTRODUCTORY SUMMARY

This appeal challenges the constitutionality of the South Carolina Motor Regulatory Act of 1925 as amended.

The principal question involved in the appeal is whether the exemption contained in the Act in favor of "farmers or dairymen hauling dairy or farm products" renders the Act unconstitutional. Another contention is that the provision of the Act basing the amount of the license fees upon the carrying capacity in tons of the vehicles is invalid.

The evidence shows that farmers and dairymen use the highways only spasmodically and seasonally, and that the use made by them of the highways is relatively insignificant as compared with the use by appellant and others regularly engaged in the business of motor transportation. Also farming and dairying lie at the foundation of the economic structure of South Carolina.

It is submitted that the exemption in favor of "farmers or dairymen hauling dairy or farm products" is valid under the principle that the legislature in making its classifications is entitled to consider "character and frequency of use" and consequent wear and tear on the highways, and also because agricultural operations are entitled to special consideration on account of being essential to the public welfare.

Stephenson v. Bainford, 77 L. ed. 203,—U. S.—;
Baking Company v. Woodring, 286 U. S. 352, 52 S. Ct. 595, 76 L. ed. 816;
Buck v. Kuykendall, 267 U. S. 307, 69 L. ed. 623;
Packard v. Banton, 264 U. S. 140, 68 L. ed. 596;
Sproles v. Binford, 286 U. S. 374, 76 L. ed. 1167;
Alward v. Johnson, 282 U. S. 509, 513, 514, 75 L. ed. 496, 499 75 A. L. R. 9, 51 S. Ct. 273;
Bekins Van Lines v. Riley, 280 U. S. 80, 82, 74 L. ed. 178, 180, 50 S. Ct. 64;
Schwartzman Service, Incorporated v. Stahl, 60 Fed.

Cf. *Smith v. Cahoon*, 283 U. S. 553–568, 75 L. ed. 1264

Also it is submitted that the license fees being based on the carrying capacity in tons of the vehicles bear a reasonable relation to the amount of use to be made of the highways by such vehicles and hence are valid.

Michigan Public Utilities Commission v. Duke, 266 U. S. 570, 69 L. ed. 445;

Interstate Busses Corp. v. Blodgett, 276 U. S. 245, 72 L. ed. 551;

Michigan C. R. Co. v. Michigan R. Commission, 236 U. S. 615, 59 L. ed. 750

Clark v. Poor, 274 U. S. 554, 71 L. ed. 1199

Also to the further objections against the provisions relating to "cargo insurance" and authorizing the Commission to regulate appellant's rates and fares, no attempt has been made to enforce these provisions and hence these objections should be disregarded.

Continental Baking Co. v. Woodring, 286 U. S. 352, 76 L. ed. 816;

Stephenson v. Binford, 77 L. ed. 203

STATEMENT OF FACTS

This argument is being prepared at this time (November 10th), by appellees' counsel without having received either a copy of the appellant's argument or of the printed record, the Clerk of this Honorable Court having notified appellees' counsel by letter of October 27th that the record had not yet been printed "due to the fact that the deposit requested to cover costs has not been made".

This appeal challenges the constitutionality of the South Carolina Motor Regulatory Act of 1925 as amended, contained in the South Carolina Code of 1932, Sections 8507-8524.

This is an appeal from a decision of the South Carolina Supreme Court, filed January 27, 1933, upholding the said Act, and granting a Writ of Injunction against the appellant and others operating over the highways of the State of South Carolina without complying with the provisions of the said Act.

The principal question sought to be raised by this appeal, as we understand, is whether the exemption contained in the said Motor Regulatory Act in favor of "farmers or dairymen, hauling dairy or farm products" (Section 8508), renders the said Act unconstitutional as depriving the appellant of equal protection of the laws.

The facts out of which this case has arisen are briefly as follows:

The Provisions of the Motor Regulatory Act

The State of South Carolina has a system of hard surfaced roads, for which the state has outstanding a large bonded indebtedness.

In 1925 the State Legislature of the State of South Carolina passed a Motor Regulatory Act, which is now contained in the Code of 1932 in sections 8507 through 8524. This Act provides for the issuing of different classes of cer-

tificate (section 8510), the classifications being for certificates A, B, C, D, E and F; the class F certificate (which is here involved) being provided for "any person, firm or corporation proposing to engage in the business commonly known as contract hauling of freight or property, and when such applicant does not propose to operate upon a regular schedule or over a regular route, or solicit or receive patronage along the route".

The Act also provides for indemnity insurance (section 8511) and also for "applications and license fees" (section 8512), the amount of the license fees for the class F carriers being based upon the carrying capacity as shown in tons." The Act also contained a provision (section 8517) regulating the "use of the fees collected", and providing for the apportionment of the fees between the roads of the highway system and the county highway systems and the streets of the cities and towns, according to use. The Act also contained a provision (section 8521) providing that if any section or clause should be held unconstitutional, such decision should not affect the validity of the remaining portions of the Act; and also a provision (section 8522) that the Act should not be construed to prevent the use of any motor vehicle for the purpose of making some particular trip "where the owner of such vehicle does not make such transportation a business".

Section 8508 of the said Act, which raises the principal question in this case, was as follows:

> "No corporation or person, their lessees, trustees, or receivers, shall operate any motor-propelled vehicle as hereinbefore defined for transportation of persons or property for compensation on any improved public highways in this State, except in accordance with the provisions of Sections 8507 to 8524, and such operation shall be subject to control, supervision and regulation by the commission in the manner provided by Sections 8507 to 8524; Provided, however, that nothing in sections 8507 to 8524 contained shall apply to motor vehi-

cles while used exclusively for transporting persons to and from schools, Sunday Schools, churches, or religious services of any kind, or to or from picnics or upon special prearranged excursions, or to United States mail carriers operating star routes, while engaged solely in carrying mail, or to farmers or dairymen, hauling dairy or farm products; or lumber haulers engaged in transporting lumber and logs from the forests to the shipping points."

The appellant, Hicklin, "has been for several years engaged in the business of motor transportation as a contract hauler of freight and property for compensation over the highways of the State of South Carolina", and comes within the class of carriers known as class F carriers, but has refused to comply with the provisions of the said motor transportation Act, or to pay the license fees provided for therein; his alleged reason for refusing compliance being that the said Act is unconstitutional (see paragraphs 2, 3 and 4 of the petition of appellees in the Court below, and paragraphs 1 and 2 of the appellant's return and answer in said Court).

On August 3, 1932 the appellees herein instituted a suit in the original jurisdiction of the South Carolina Supreme Court for the purpose of having the said Act enforced as against the appellant and of requiring the appellant and others to comply therewith, or, in the alternative, to enjoin and restrain them from operating over the highways of the state. This suit was instituted by a rule to show cause signed by a Justice of the Supreme Court, returnable before the Supreme Court at the next (October 1932) term of the said Court.

This petition alleged substantially the facts as above stated.

To this petition appellant filed his return and answer, claiming particularly (in par. 5) that the said Act was unconstitutional by reason of exemptions in favor of "farmers or dairymen, hauling dairy or farm products", and also for

certain other reasons as set forth in paragraphs 6 and 7, but admitting substantially all the allegations of fact contained in the petition (see paragraphs 1 and 2 of said return and answer). The appellant also filed a demurrer to the said petition.

Upon the receipt of these pleadings on behalf of the appellant, counsel for the appellees served a notice, dated September 10th, on appellant's counsel for an order of reference "to a suitable Referee to take such testimony as may be desired to be offered by the parties herein on the issues involved." Said notice also stated that the motion was made for the purpose of expediting the trial and determination of the case, but without waiving the position that the case was pending in all particulars for trial by the Supreme Court of South Carolina, and that for such reason the motion would not be pressed against objection by the respondent. To this notice appellees' counsel replied by letter, objecting to having the issues referred to a referee. This letter was dated September 15th, and is made a part of the record in this cause.

Appellees' counsel thereupon obtained leave from the Justice of the Supreme Court authorizing the filing of a verified reply on behalf of the appellees herein, and giving the appellants the right, if they desired to controvert any of the facts set forth in the reply, to file any further counter-reply or rebuttal as they might be advised.

Pleadings Show Farmers and Dairymen Make Relatively Slight and Infrequent Use of Highways

This reply, so served, contained the following statement of facts, as to which there was no denial filed by the appellants:

> "That moreover, the petitioners know of their own personal knowledge, and this Court should take judicial notice thereof, that farmers and dairymen, insofar as they use the highways of the State of South Carolina at all, use them only seasonally and spasmodically; that

there are practically only two seasons in the year when there is any occasion whatsoever for the farmers to make any use of the highways, that is during the months of May, June, and July, when certain truck crops are harvested, and during the fall months of September, October, and November, when the staple crops, such as cotton, corn and peas, are harvested, but that the use made by farmers of the said highways is very small and relatively insignificant as compared with the use made of such highways by the respondents and others regularly engaged in the business of contract hauling for compensation over the highways of the State of South Carolina:

"That moreover such farmers and dairymen as do use the highways of the State of South Carolina generally have very small and light trucks and engage in only very short hauls:

"That on the contrary respondents and others in like situation engaged regularly in the business of transport hauling make a much more extensive use of the highways, operating throughout the State from one end to the other, and furthermore use much heavier and larger trucks. Consequently, the wear and tear upon the highways in the State of South Carolina from persons regularly engaged in contract hauling for hire, such as the respondents herein, is much more serious than that occasioned by farmers and/or dairymen, and/or lumber hauling:

"That in general the same statements hereinabove made as applicable to farmers are also applicable to dairymen and lumber haulers, and that as hereinabove shown in the regulation promulgated by this Commission, when and if farmers and/or dairymen engage regularly in the business of hauling for others for compensation, they are no longer deemed to be farmers or dairymen for the purpose of this Act and, hence

are required to comply with the Act like all other persons engaged in transportation for hire."

Attached to this reply, also, and made a part thereof, was an affidavit by W. W. Goodman, Superintendent of the Motor Transport Division of the Railroad Commission of the State of South Carolina. This affidavit contained, among others, the following statements of fact, which are also uncontradicted:

> ". . . **that, he knows of his own knowledge that the Railroad Commission has not and is not exempting any persons from the payment of the tax who is carrying on the business similar to the respondent in this action;** that, there are a number of farmers, dairymen, and lumbermen, paying the tax when they operate on the highways for compensation, as does the respondent herein; . . . but no person is operating on the highways for compensation as a part of a regular business with the approval or consent of the Commission, without obtaining the Certificate and paying the fees." (Emphasis ours.)

The appellants filed no further pleadings of any sort and filed no rebuttal evidence as to any of the facts contained in this reply.

Thereafter, on October 3, 1932, appellees' counsel served the appellants with notice of a motion to the effect that they would call up the case for hearing on Tuesday, October 11th, and would move the Court to strike out the demurrer and grant judgment for the relief prayed for in the petition, and that said motion was based upon the pleadings.

The case was argued before the South Carolina Supreme Court upon the pleadings and upon the record as made, in accordance with the said notice, on October 11, 1932.

Thereafter the South Carolina Supreme Court handed down a decision on January 27, 1933, overruling the demurrers filed by the appellants, sustaining the Act, and granting the relief prayed for in the petition.

Act Upheld by South Carolina Supreme Court

The South Carolina Supreme Court held in effect, as will be seen by reference to the decision incorporated in the record herein, that the exemptions contained in the Act in favor of farmers or dairymen hauling dairy or farm products, did not render the Act unconstitutional for the reasons that the use made by the farmers and dairymen of the highways was only occasional and seasonal, and very light as compared with the use made by the appellants and others in like situation, and also for the further reason "that farming and dairying lie at the foundation of our economic structure and are essential to the public welfare."

In its decision the South Carolina Supreme Court cited and relied upon the case of *Continental Baking Company v. Woodring*, 286 U. S. 352, 76 L. ed. 816; and also *Sproles v. Binford*, 286 U. S. 374, 76 L. ed. 1176; *Schwartzman Service v. Stahl*, 60 Fed. (2) 1034; and *Stephenson v. Binford*, 77 L. ed. 203; and distinguished the case of *Smith v. Cahoon*, 283 U. S. 553, 75 L. ed. 1264. That Court also made the following findings and conclusions of law and fact:

> "The petitioners contend that the *Cahoon case* may be validly distinguished in the cases at bar as it was in the cases cited, and in this we agree. In the first place, in the *Cahoon case*, the Court was dealing with a criminal prosecution, which point it stressed, saying: 'It should be observed that this is not an action in equity where the enforcement of the statute awaits the final determination of the Court as to validity and scope.' The cases before us are suits in equity, in which this Court is asked to construe the Acts in question. Also, in that case, the discrimination was in favor of 'any transportation company' engaged in hauling the class of products therein mentioned, while in the cases at bar the discrimination is in favor of farm and dairy products only when hauled by farmers and dairymen, and in favor of lumber haulers engaged in transporting lumber and logs from the forest to the shipping points. In other words, there is a double

element involved in the classification in this case, the class of persons and the class of products, while there was only one element of classification involved in the *Cahoon case,* namely, the class of products.

"It must be conceded, as has been held in *German Alliance Insurance Company v. Kansas,* 233 U. S., 389, that even though an exemption operates as a discrimination, it is not necessarily invalid; and, also, as is generally held, that a classification or discrimination should be allowed to stand unless it is entirely arbitrary. Unquestionably, the use by farmers and dairymen for the transportation of farm and dairy products is seasonal and involves only a moderate use of the highways; and the exemption here is further limited by the fact that it can apply only to one whose principal business is that of a farmer or dairyman and not to one merely incidentally engaged in farming or dairying. As pointed out in the *Woodring case,* there is a practical difference between such use of the highways and that made by the respondents in this case, 'who operate fleets of trucks in the conduct of their business and who use the highways daily in the delivery of their products to their customers,' the Court holding, as we have seen, that the Legislature in making its classification was entitled to consider frequency and character of use, etc. In addition, there is this material consideration, that farming and dairying lie at the foundation of our economic structure and are essential to the public welfare."

The Court also adversely disposed of the other contentions made by the appellant in that Court; fixing (in Section II), that the Act, properly construed, did not require the appellants or other contract carriers to carry cargo insurance; holding that the failure of the Railroad Commission to undertake to fix the rates and schedules of the appellants rendered that objection made by the appellants academic; holding also, as to the provision of the Act basing the amount of the license fees upon the carrying ca-

pacity, that such fees were collected "for the purpose of maintaining the public highways over which such motor vehicles shall operate as compensation for their use"; and further, that they "are reasonable as to amount, and tend to contribute protection of the highways".

The appellant, Hicklin, as we understand from his petition for appeal and assignment of errors, and from his "Statement as to the Jurisdiction of the Court," and also from the subsequently filed statement of points (filed on May 23, 1933) seeks to raise substantially the same questions as were raised before the South Carolina Supreme Court, hereinabove mentioned.

The decision of the South Carolina Supreme Court, quoted in the record herein, also dealt with the case against the *Blalock Motor Express, Inc.*, but the said Blalock Motor Express, Inc., has failed to file the bond required by the South Carolina Supreme Court in allowing the appeal, and consequently its appeal has been abandoned, and that portion of the decision of the South Carolina Supreme Court relating thereto, and also the assignments of error relating to that appeal (see Assignment No. 4), are not here involved.

It is our position, and it is respectfully submitted, that the decision of the South Carolina Supreme Court is sound and is sustained by the record in the case and by decisions of this Honorable Court, and that the judgment of that Court should be affirmed.

ARGUMENT

I.

Exemption in Favor of Farmers or Dairymen Valid Because Their Use of Highways Slight and Infrequent

It is submitted that the exemption in the Motor Regulatory Act in favor of "farmers or dairymen hauling dairy or farm products" is entirely valid under the established prin-

ciple that the Legislature "in making this classification was entitled to consider frequency and character of use and to adapt its regulations to the classes of operations", and also because farming and dairying are essential to the public welfare and hence are entitled to special consideration.

Stephenson v. Binford, 77 L. ed. 203,—U. S.—;
Baking Company v. Woodring, 286 U. S. 352, 52 S. Ct. 595, 76 L. ed. 816;
Buck v. Kuykendall, 267 U. S. 307, 69 L. ed. 623;
Packard v. Banton, 264 U. S. 140, 68 L. ed. 596;
Sproles v. Binford, 286 U. S. 374, 76 L. ed. 1167;
Alward v. Johnson, 282 U. S. 509, 513, 514, 75 L. ed. 496, 499, 75 A. L. R. 9, 51 S. Ct. 273;
Bekins Van Lines v. Riley, 280 U. S. 80, 82, 74 L. ed. 178, 180, 50 S. Ct. 64
Schwartzman Service, Incorporated v. Stahl, 60 Fed. (2) 1034.
cf *Smith v. Cahoon,* 283 U. S. 553, 568, 75 L. ed. 1264.

It is earnestly and respectfully submitted that the exemption contained in this Act in favor of farmers or dairymen hauling dairy or farm products is not in any proper sense arbitrary, but is based upon sound economic considerations, and is valid.

This conclusion, it is submitted, rests both upon the principle that the Legislature in fixing its classifications is entitled to consider the frequency and character of the use to which the highways are put, and the consequent wear and tear thereon, and upon the principle that the Legislature, in the exercise of its duty to prescribe for the public welfare, is justified in making a distinction in favor of the basic industries of farming and dairying, which are essential to the public welfare.

The uncontradicted evidence in this case clearly establishes that the use of the highways by the farmers or dairymen is only seasonal and spasmodic; that, in fact, there are only two seasons of the year when the farmers make any use of the highways for the purpose of hauling farm prod-

ucts—that is, during the months of May, June and July, when truck crops are harvested; and during the fall months of September, October and November, when the staple crops, such as cotton, corn and peas, are harvested. Moreover, it is likewise established by the evidence that the farmers generally have very small and light trucks, and engage in only very short hauls. On the other hand, the appellant and those in like situations, who are regularly engaged in the business of transport hauling, make a much more extensive use of the highways, operating throughout the state from one end to another, and use much heavier and larger trucks. Hence the wear and tear upon the highways from the appellant and others in like situations is much more severe than that arising from the use by the farmers or dairymen when hauling their farm and dairy products. As was stated in the verified reply herein, the use made by the farmers of the highways is small and relatively insignificant.

The same facts as above stated with relation to farmers apply in large measure to the use of the highways made by dairymen.

Moreover, the South Carolina Supreme Court has construed this exemption as operating only in favor of those "whose principal business is that of a farmer or dairyman, and not to one who merely incidentally engaged in farming or dairying." It therefore follows necessarily, as a matter of common sense and common knowledge that one whose principal business is farming or dairying, cannot make anything like the extensive use of the highways that is made by those regularly engaged in transport hauling as a principal occupation or business. It is a matter of which all courts may take judicial knowledge that the matter of transport hauling is in a highly progressive state and that it is to a large extent now almost supplanting the railroad freight business, and that those who regularly engage in transport hauling, as is the case with appellants herein, operate whole

fleets of large and heavy trucks from one end of the state to the other.

It is earnestly submitted that it must be apparent to this Honorable Court, as was found by the South Carolina Supreme Court and as is shown by the record herein, that the use made by farmers or dairymen—that is, those who principal business is, in fact, farming or dairying,—cannot really be comparable to the use which is made by such regular transportation companies and concerns.

Also it is respectfully submitted that the Legislature of the State of South Carolina was fully justified in the performance of its duty to promote the public welfare in making a distinction or discrimination in favor of farming and dairying, both in favor of the individuals comprising that much distressed occupation, and also in favor of the products of such occupation. The exemption in this case takes on a double aspect in that it operates only in favor of farmers and dairymen when hauling farm and dairy products. The benefit of the exemption, therefore, runs directly and exclusively in favor of farmers and dairymen. The exemption is not in favor of farm or dairy products when hauled by non-farmers or any other regular transportation company, nor is the exemption in favor of farmers and/or dairymen when hauling general products, or hauling ordinary merchandise, but the exemption is operative only when the farm and/or dairy products are being hauled by farmers or dairymen. This, of course, makes a very much narrower class of operations that receive the benefit of the exemption. The whole exemption thus operates in favor of farming and/or dairying.

It is also common knowledge and a matter of general economic history well known to the Legislature and to the courts of the State of South Carolina and also to the public generally that the State of South Carolina is largely an agricultural state, where the great bulk of the people derive their livelihood from some form of agricultural operations.

It is likewise equally well known that as a general rule the farming and dairying industries of the State of South Carolina (and elsewhere, for that matter) have really been in great financial distress almost continuously for the past ten or twelve years—in fact, since the deflation of 1921. In fact, the plight of the farmer and of the agricultural industry generally is so great and so universal that the present national administration has set into motion a wide variety of agencies for the help and improvement of agricultural conditions throughout the country. The condition of the farmer is one of the serious problems of the time. These generally bad conditions affecting the agricultural industries generally have been applicable in a high degree in the State of South Carolina.

It is therefore respectfully submitted, for the foregoing reasons, that the Legislature of the State of South Carolina was fully justified in making this exemption in favor of the farming and dairying industries independently of, and in addition to, the consideration of the character and frequency of the use of the highways.

Authorities Show Such Exemption in Favor of Farmers and Dairymen Valid

The foregoing principles are, it is submitted, fully established and recognized by the above cited decisions of this Honorable Court, and also of other courts. It is submitted that they are in exact accord with the *ratio decidendi* of the above cited cases of *Continental Baking Company v. Woodring*, 286 U. S. 352, 76 L. ed. 816; *Sproles v. Binford*, 286 U. S. 374, 76 L. ed. 1167; and also *Schwartzman Service, Incorporated v. Stahl, et al*, 60 Fed. (2) 1934, and are not in any proper sense in conflict with the decision of this Honorable Court in *Smith v. Cahoon*, 283 U. S. 553, 75 L. ed. 1264.

In the *Continental Baking Company* case the Act under consideration provided:

"This act shall not apply * * * to the transportation of live stock and farm products to the market by the owner thereof, or supplies for his own use in his own motor vehicle or to the transportation of children to and from school."

This Honorable Court upheld the exemption and distinguished the question in that case from the decision in the *Smith v. Cahoon* case.

"The distinction in the instant case" said the Court in rendering its decision, "is of a different sort. The statute does not attempt to impose any arbitrary discrimination between carriers who transport property for hire, or compensation, with respect to the class of products they carry. The exemption runs only to one who is carrying his own livestock and farm products to market or supplies for his own use in his own motor vehicle. In sustaining the exemption, the District Court referred to the factual basis for the distinction. 'The Legislature knew,' said the Court, 'that as a matter of fact farm products are transported to town by the farmer, or by a non-exempt "contract carrier" employed by him. **The Legislature knew as a matter of fact the use of the highways for the transportation of farm products by the owner is casual and infrequent and incidental; farmers use the highways to transport their products to market ordinarily but a few times a year.** The Legislature rightly concluded that the use of the highways for carrying home his groceries in his own automobile is adequately compensated by the general tax imposed on all 'motor vehicles'. 55 F. (2d) at page 352. And the Court properly excluded from consideration mere hypothetical and fanciful illustrations of possible discriminations which had no basis in the actual experience to which the statute was addressed. The Court found a practical difference between the case of the appellants 'who operate fleets of trucks in the conduct of their business and who use the high-

ways daily in the delivery of their products to their customers', and that of 'a farmer who hauls his wheat or livestock to town once or twice a year'. **The Legislature in making its classification was entitled to consider frequency and character of use and to adapt its regulations to the classes of operations, which by reason of their habitual and constant use of the highways brought about the conditions making regulation imperative and created the necessity for the imposition of a tax for maintenance and reconstruction.** As the Court said in *Alward v. Johnson*, 282 U. S., 509, 513, 514; 51 S. Ct., 273, 274; 75 L. ed., 496; 75 A. L. R., 9: 'The distinction between property employed in conducting a business which requires constant and unusual use of the highways and property not so employed is plain enough.' See also, *Bekins Van Lines v. Riley*, 280 U. S., 80, 82; 50 S. Ct., 64; 74 L. ed., 178; *Carley & Hamilton v. Snook*, 281 U. S. 66, 73; 50 S. Ct., 204; 74 L. ed., 704; 68 A. L. R., 194."

(Emphasis ours.)

It is earnestly submitted that the point of the distinction made in the *Continental Baking Company* case by this Honorable Court between that case and the *Smith v. Cahoon* case is equally applicable and valid in the case at bar.

In the *Smith v. Cahoon* case the exemption was in favor of "any transportation company" which was engaged in hauling the type or variety of products therein mentioned, which, moreover, were not confined to farm or dairy products. In other words, any transportation company, under the statute there involved—that is, in the *Smith v. Cahoon* case—might, by engaging in the transportation of the variety of products therein favored, obtain exemption as against any other transportation company which did not engage exclusively in the transportation of those products. In the case at bar, on the other hand, as in the *Continental Baking Company* case, the exemption runs only in favor of farmers or dairymen, and when they are hauling the products of their own industry.

As we have already pointed out, the exemption does not run in favor of any other transportation company or of any other individuals who may engage in the transportation of farm or dairy products, but the exemption is confined exclusively to farmers or dairymen.

It is true that in the *Continental Baking Company* case the exemption was further limited by the exemption being confined to the transportation of such products "by the owner thereof", but it is submitted that this distinction is more apparent than real, and that, in fact, the exemption was very closely analogous to the exemption in the case at bar, since the exemption in the case at bar applies only in favor of those whose principal business is farming and/or dairying, when hauling farm or dairy products. The basis of the distinction, as approved by this Honorable Court in the *Continental Baking Co.* case, was the relative infrequency and slightness of the use to which the farmers would be able to put the highways, as compared with the "habitual and constant" use of the highways to which they would be put by those regularly engaged in the business of transport hauling. This distinction, it is earnestly and respectfully submitted, is equally applicable in the case at bar, and should be applied by this Honorable Court in favor of the Act in question.

Also, in the above cited case of *Sproles v. Binford*, there was a discrimination in favor of "implements of husbandry, including machinery used solely for the purpose of drilling water wells * * *", which exemption as to the implements of husbandry was construed to include plows, threshing machines, hay pressers, etc. The Court upheld this distinction upon the ground that such implements "must be moved from one place to another" "in order to carry on the business of farming", and that "the uses of the highways for this sort of transportation are temporary only, **and essential to the public welfare"** (76 L. ed. 1178). It is earnestly and respectfully submitted that this distinction, as thus made by this Honorable Court, it obviously sound and peculiarly applicable to the conditions in the State of South Carolina, and applicable to

the farming and dairying industries, which are "essential to the public welfare".

> "In exercising this authority over its highways", continued this Court, in language which is equally applicable to the case at bar, the State is not limited to the raising of revenue for maintenance and reconstruction, or to regulations as to the manner in which vehicles shall be operated, but the State may also prevent the wear and hazards due to excessive size of vehicles and weight of load. Limitations of size and weight are manifestly subjects within the broad range of legislative discretion. To make scientific precision a criterion of constitutional power would be to subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the 14th Amendment was intended to secure. *Ohio Oil Co. v. Conway*, 281 U. S. 146, 159, 74 L. ed. 775, 781, 50 S. Ct. 310. When the subject lies within the police power of the State, debatable questions as to reasonableness are not for the courts but for the legislature, which is entitled to form its own judgment, and its action within its range of discretion cannot be set aside because compliance is burdensome. *Standard Oil Co. v. Marysville*, 279 U. S. 582, 586, 73 L. ed. 856, 860, 49 S. Ct. T. 430; *Price v. Illinois*, 238 U. S. 446, 452, 453, 59 L. ed. 1400, 1405, 1406, 35 S. C. 892; *Hadacheck v. Sebastian*, 239 U. S. 394, 410, 60 L. ed. 348, 356, 36 S. C. 143, Ann. Cas. 1917B, 927; *Euclid v. Ambler Realty Co.* 272 U. S. 365, 388, 71 L. ed. 303, 310, 54 A. L. R. 1016, 47 S. Ct. 144; *Zahn v. Board of Public Works*, 274 U. S. 325, 328, 71 L. ed. 1074, 1076, 47 S. Ct. 594."

In this case, also, this Honorable Court upheld a discrimination in favor of short hauls, notwithstanding the contention made by the carriers there, that this discrimination was made in order to favor the railroads. The exemption contained in the Act there in question was in favor of vehicles transporting "property from the point of origin to the nearest

practicable common carrier receiving or loading point or from a common carrier unloading point by way of the shortest practicable route to destination". This Court said:

> "But the legislature in making its classifications was entitled to consider frequency and character of use and to adapt its regulations to the classes of operations which by reason of their extensive as well constant use of the highways brought about the conditions making the regulations necessary, *Continental Baking Co. v. Woodring*, 286 U. S. 352, ante, 1155, 52 S. Ct. 595 *supra*. It is said that the exception was designed to favor transportation by railroad as against transportation by motor trucks. If this was the motive of the legislature, it does not follow that the classification as made in this case would be invalid."

The Court further continued that this "is not a case of arbitrary discrimination between products carried, as in the Case of *Smith v. Cahoon*, 283 U. S. 553, 75 L. ed. 1264, * * *. The discrimination is simply in favor of short hauls and of operations, which as the District Court found, are confined to small areas and greatly reduce the danger of traffic congestion and highway casualties". It is submitted that this principle is again applicable in the case at bar since, as a practicable proposition, even though not expressly stated in the Act, all hauls by the farmers and/or dairymen are necessarily relatively short. The above quotation is also significant as showing that this Honorable Court construed the *Smith v. Cahoon case* as being based upon the arbitrariness of the discrimination "between the products carried" and conversely as having no application whereas in the case at bar the discrimination runs not so much in favor of the class of products carried as in favor of the classes of persons—that is, farmers and dairymen—who are doing the carrying.

We also beg leave to adopt the further language of this Honorable Court in that case as being peculiarly applicable to the question involved in the case at bar:

"There is no constitutional requirement that regulation must reach every class to which it might be applied,—that the legislature must regulate all or none. *Silver v. Silver,* 280 U. S. 117, 123, 74 L. ed. 221, 225, 65 A. L. R. 939, 50 S. Ct. 57. The State is not bound to cover the whole field of possible abuses. *Patsone v. Pennsylvania,* 232 U. S. 138, 144, 58 L. ed. 539, 543, 34 S. Ct. 281. The question is whether the classification adopted lacks a rational basis. *Lindsley v. Natural Carbonic Gas Co.,* 220 U. S. 61, 78, 55 L. ed. 369, 377, 31 S. Ct. 337, Ann. Cas. 1912C, 160; *Keokee Consol. Coke Co. v. Taylor,* 234 U. S. 224, 227, 58 L. ed. 1288, 1289, 34 S. Ct. 856; *Miller v. Wilson,* 236 U. S. 373, 384, 59 L. ed. 628, 632, L. R. A. 1915F, 829, 35 S. Ct. 342; *Carley & Hamilton v. Snook,* 281 U. S. 66, 74 L. ed. 704, 68 A. L. R. 194, 50 S. Ct. 204, *supra; Smith v. Cahoon,* 283 U. S. 553, 75 L. ed. 1264, 51 S. Ct. 582, *supra.* We can not say that such a basis is lacking in this instance."

Likewise in the above cited case of *Schwartzman Service v. Stahl,* decided by the Missouri (Three-Judge) District Court, the exemption provisions contained in the Act in question were as follows:

"'The provisions of this Act shall not apply to . . . motor vehicles used exclusively in transporting farm and dairy products from the farm or dairy to warehouse, creamery, or other original storage or market; nor to motor vehicles used exclusively in the distribution of newspapers from the publisher to subscribers or distributors.'

The Court upheld the provision in an able opinion, which it is submitted is essentially sound, and established the basis for a discrimination in favor of farmers and farm products.

'It is the main contention of the plaintiff,' said the Court, *passim,* 'that said enactment is unconstitutional because discriminatory in favor of "motor vehicles used

exclusively in transporting farm and dairy products, etcetera."'

"1. At the outset it must be acknowledged that the state has the power to regulate vehicles over its highways. This it may do in the interest of public convenience and safety and for the protection of the highways. Provisions of this character have been uniformly sustained. *Buck v. Kuykendall*, 267 U. S. 307, 1. c. 314; *Stephenson v. Binford, et al*, 53 Fed. (2) 509.

"Moreover, while 'a citizen may have, under the Fourteenth Amendment, the right to travel and transport his property upon them by auto vehicle' yet 'he has no right to make the highways his place of business by using them as a common carrier for hire. Such use is a privilege which may be granted or withheld by the State in its discretion, without violating either the due process clause or the equal protection clause.' *Packard v. Banton*, 264 U. S. 140, l. c. 144.

"The highways belong to the State. It may make provisions appropriate for securing the safety and convenience of the public in the use of them. *Kane v. State of New Jersey*, 242 U. S. 160.

"2. Assuming, therefore, the power and right of the State to regulate and supervise its highways, such right can not be hampered or restricted within narrow bounds.

"On the contrary, to the end that such right might be fully enjoyed and exercised, there is a constant recognition of the principle that the State 'has a broad discretion in classification in the exercise of its power of regulation.' *Smith v. Cahoon*, 283 U. S. 553, l. c. 586. Upon such classification, no person can interpose an objection, save only in those cases where the classification or discrimination is entirely arbitrary.

. . .

"4. With the foregoing principles of law in mind as postulates, the constitutionality of the provision assailed may be considered. The alleged discriminatory or unequal

provisions apply alike in favor of both common carriers and contract haulers when their motor vehicles are 'used exclusively in transporting and dairy products from the farm or dairy to warehouse, creamery, or other original storage or market.'

"It was in evidence that the trucks so used, and subject to the exemption, are owned and operated by farmers in gathering such agricultural products, as live stock, cream and milk, from individual farmers and transporting such products to local towns where they are shipped by rail to the city markets. **Many of such uses are seasonal and involve very moderate use of the highway.**

. . .

"It is the law that even though an exemption is a clear discrimination, it is not invalid unless arbitrary. *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389, l. c. 418. In fact the legislative classification may rest on narrow distinctions as decided in *German Alliance Ins. Co. v. Kansas, supra.*

"It must be conceded that the interest of the public is involved in the gathering and marketing of farm products as speedily and economically as possible. The Legislature no doubt had in mind the facts, as same have been made to appear to us, that the only use made by trucks within the exemption would be in gathering the products of the farmer and transporting them to the nearest shipping point.

"Necessarily, this would not involve an extensive use of the highways. In a few instances, no doubt the farmer would live on the State-owned and controlled highway, but in most instances this would not be true.

"In the majority of cases the farmers first reach the State highways at the place of marketing their products. In such cases they would not use the State highways at all. The highways would not be used by the farmer in marketing his product as much as the con-

tract hauler and motor carrier would use the same highways within cities and suburban zones:

"Moreover, long hauls could not be economically made under this exemption. The motor vehicle employed must return empty as farm products could not be hauled both ways to market. Again, large heavy trucks could not be used in gathering farm products. Much of the time such trucks would be off of hard surfaced roads.' (Emphasis ours.)

Act Construed as Not Exempting Farmers and Dairymen if Regularly Engaged in Transport Hauling

Also it is to be noted that the Railroad Commission has in fact construed this exemption, and has adopted a regulation to this effect, as applying only in favor of farmers and dairymen "who occasionally but do not regularly as a part of an established business haul farm and/or dairy products for others for hire, but that persons who may also be engaged in part in farming operations, but who make a regular business of transporting farm and/or dairy products for others for hire are not to be deemed farmers or dairymen for the purpose of this Act . . . .". (see reply, par. 1).

It is thus apparent that the Railroad Commission has, in fact, construed the Act as meaning that one who really makes a regular business of transport hauling, even though he may also be a farmer, is not entitled to the benefits of the exemption contained in the Act. In other words, insofar as one in fact makes transport hauling a regular business, he is not to be deemed a farmer for the purposes of the construction of the Act.

It is submitted that this is an entirely permissible construction for the Commission to put upon this Act. The question of who is or is not a farmer is, of course, a question of fact, and the Commission, it is submitted, has the inherent right, in construing and applying the Act, to determine that one who is regularly engaged in the business of transport hauling, is not, in fact, a farmer.

It is submitted, therefore, that the appellant in no event has any valid basis for complaint in this case. As was well stated by this Honorable Court in the *Continental Baking Co.* case above, the court should exclude from consideration "mere hypothetical and fanciful illustrations of possible discriminations which had no basis in the actual experience to which this statute was addressed". This case in fact, it is submitted, falls within the principle of the above cited *Stephenson v. Binford,* (77 L. ed. 203, 214), to the effect that "so far as appears no attempt has yet been made to enforce the provisions against any of these appellants, and until that is done they have no occasion to complain".

It should also be noted in this connection that the exemption in favor of farmers or dairymen, should normally and properly be applied and has been, in fact, so applied by the Commission in favor only of natural persons who are engaged in farming or dairying, as distinct from corporations or companies. This question, it is submitted, furnishes a valid basis of distinction and discrimination in support of the Act. It also furnishes a valid basis of distinction from the above cited *Smith v. Cahoon* case, wherein the exemption which was disallowed by this Honorable Court was in favor of "any transportation company".

In the above discussed cases (*Continental Baking Co. v. Woodring,* 286 U. S. 352, 76 L. ed. 1167; and *Sproles v. Binford,* 286 U. S. 374, 76 L. ed. 1167), and in the *Schwartzman Service, Inc. v. Stahl* case (60 Fed. (2) 1034), and in the decision of the South Carolina Supreme Court, the *Smith v. Cahoon* case (283 U. S. 553, 568 75 L. ed. 1264), upon which the appellant relies so heavily, was distinguished by this Honorable Court and the other courts concerned.

It is submitted that the *Smith v. Cahoon* case may be validly distinguished in this case, as it was in the above cases and as has been indicated in the foregoing discussion, for the following, among other, reasons:

(a) The *Smith v. Cahoon* case dealt with a criminal prosecution. The Court stressed this point saying: "It should be observed that this is not an action in equity where the enforcement of a statute awaits the final determination of the court as to validity and scope." (75 L. ed. p. 1273)

(b) In the *Smith v. Cahoon* case the discrimination was in favor of "any transportation company" engaged in hauling the class of products therein mentioned.

In the case at bar, however, the discrimination is in favor of farm and dairy products **only when hauled by farmers and dairymen,** and in favor of lumber haulers engaged in transporting lumber and logs from the forest to the shipping points. In other words the discrimination in the case at bar relates not only to the class of products, but also to the class of persons engaged in the hauling.

The point of the distinction is that under the statute involved in the *Smith v. Cahoon* case any transport company, that is any regular organized transportation company, could become engaged exclusively in hauling the class of products concerned and hence be exempt, whereas in the case at bar the exemption operates only in favor of farmers and dairymen and lumber haulers and would not be applicable in favor of any indiscriminate transportation company. In other words there is a double element involved in the classification in this case, both as to the class of persons and also as to the class of products, whereas there was only one element of classification involved in the *Smith v. Cahoon* case, i. e. as to the class of products.

(c) Also in this connection it should be noted that the decision in this *Smith v. Cahoon* case, which was decided from Florida in the year 1931, is not necessarily applicable to the State of South Carolina at this time, where the economic and general conditions are materially different from conditions in Florida (see *Block v. Hirsch,* 256 U. S. 135, 65 L. ed. 865). As was stated by this Court in the above cited case "plainly circumstances may so change in time or so differ in space" as to justify one conclusion as to one particular set of circum-

stances or a particular time, and a different conclusion as to another time and place. Also in this connection it is to be noted the the exemption in the *Smith v. Cahoon* case ran not only in favor of farm and dairy products but also in favor of fresh and salt fish and oysters and shrimp.

It is submitted, therefore, that under the above discussed decisions and for the foregoing reasons, a valid discrimination may be made in favor of farmers and dairymen hauling farm and dairy products, in view of the limited seasonal use made by them of the highways, and also in view of the close relation between the farming and dairying industries and the public welfare, and that the *Smith v. Cahoon* case is inapplicable to the case at bar.

The remaining objections sought to be raised by the appellant to the Act, it seems to us, require relatively little consideration. It is also impossible for us at this time, in the absence of appellant's argument, to understand which of these contentions are intended to be pressed by the appellant before this court.

II.

Provisions as to Cargo Insurance and Regulation of Rates and Fares not Attempted to be Enforced

The points sought to be raised by the appellant in his answer in the Court below (par. 7) and also in the "statement as to the jurisdiction," and in the Assignments of Error (Nos. 2 and 5) in regard to (a) cargo insurance and (b) in regard to the Commission's being charged with the duty of regulating the rates and fares of appellants and others in like situations, may be sufficiently answered, it is submitted, by the simple fact that there has been no showing that the Commission has ever undertaken to enforce the said provisions of the Act as against the appellant or others in like situations—in fact it was conceded in the answer (see par. 7) that the Commission

had never undertaken to regulate appellants' rates or charges (see the *Continental Baking Co. v. Woodring* case, supra; and *Stephenson v. Binford*, 77 L. ed. 203).

As was stated by this Honorable Court in the *Stephenson v. Binford* case, "so far as appears, no attempt has yet been made to enforce the provision against any of these appellants, and until that is done they have no occasion to complain."

Also, as was held by the court in the *Continental Baking Co.* case the court will exclude from consideration "mere hypothetical and fanciful illustrations of possible discriminations which had no basis in the actual experience to which the statute was addressed."

Moreover, as to the matter of cargo insurance, the Supreme Court of South Carolina specifically held (see part 11 of the Opinion) that the said section of the Act (8511) with regard to cargo insurance, complained of by appellant, did not apply to the appellant and did not authorize the Commission to require the appellant to furnish such cargo insurance. It is established by authorities too numerous to mention that the decision of the State Supreme Court construing the state statutes will be accepted as final and conclusive by this Honorable Court, and hence this decision of the South Carolina Supreme Court removes the grounds of this complaint against the statute.

(Also it may be noted that the language of this section of the Act (Sec. 8511) is quite complicated and involved, and the Supreme Court of South Carolina was amply justified in holding that the Act cannot be construed as authorizing the Commission to require cargo insurance from the appellant and others, which might render said section unconstitutional, under the decision of this Court in *Michigan Public Utilities v. Duke* (266 U. S. 560, 69 L. ed. 445).)

III.

License Fees Based on Carrying Capacity in Tons Valid and Reasonable

As to the point which we assume is intended to be made by Point III of the Statement of Points, and by Assignment III, to the effect under section 8512 of the Acts the license fees are based wholly on carrying capacity, it is submitted that it is sufficient to point out that this point was not raised by the appellant's answer and hence need not be considered by this Court, under the established principle that constitutional objections must be raised at the first opportunity.

The point, however, was raised in the State Supreme Court, but was, it is submitted, properly disposed of by the South Carolina Supreme Court in its decision (see part III thereof) under the established principle that "a state which at its own expense furnished special facilities for the use of those engaged in intrastate and interstate commerce, may exact compensation therefor, and if the charges are reasonable and uniform, they constitute no burden on interstate commerce."

Michigan Public Utilities Commission v. Duke, 266 U. S. 570, 69 L. ed. 445;

Interstate Busses Corporation v. Blodgett, 276 U. S. 245, 72 L. ed. 551;

Michigan C. R. Co. v. Michigan R. Commission, 236 U. S. 615, 59 L. ed. 750.

(See also the Case of *Continental Baking Company v. Woodring, supra*, and the Case of *Sproles v. Binford, supra*.)

In regard to this the South Carolina Supreme Court said:

> "We have made a careful examination of the authorities with reference to this particular contention and think it is without merit. Such fees are collected, as provided for by section 8517, for the purpose of maintaining the public highways over which such motor vehicles shall operate, as compensation for their use. Further, they are reasonable as to amount and tend to contribute to the protection of the highways. We do not think that the

provision of the act here complained of constitutes an undue burden on interstate commerce."

It is submitted that this decision of the South Carolina Supreme Court is fully supported by the above cited and many other decisions of this Honorable Court.

> "A State which, at its own expense, furnishes special facilities for the use of those engaged in intrastate and interstate commerce may exact compensation therefor, and if the charges are reasonable and uniform, they constitute no burden on interstate commerce. *Hendrick v. Maryland*, 235 U. S. 610, 622, 59 L. ed. 385, 390, 35 Sup. Ct. Rep. 140; *Kane v. New Jersey*, 242 U. S. 160, 167, 71 L. ed. 222, 226, 37 Sup. Ct. Rep. 30. Such regulations are deemed to be reasonable and to affect interstate commerce only incidentally and indirectly."
>
> *Michigan Public Utilities Commission v. Duke*, 266 U. S. 570, 45 S. Ct. 191, 69 L. ed. 445, 36 A. L. R. 1105.

It is settled that the State may impose taxes upon the intrastate operations of a motor carrier though such motor carrier is also engaged in interstate operations.

> *Interstate Busses Corporation v. Blodgett*, 276 U. S. 245, 72 L. ed. 551.

In a case of this sort the burden is upon the plaintiff to show that in actual practice the tax operates to deprive him of his constitutional rights.

> See *Interstate Busses Corporation v. Blodgett, supra.*

The Federal Supreme Court "must indulge the presumption until the contrary is made to appear that the state will not so construe or enforce the order as to interfere with or obstruct such commerce. Ohio Tax Cases, 232 U. S. 576, 591, 58 L. ed. 738, 745, 34 Sup. Ct. Rep. 372; *St. Louis Southwestern R. Co. v. Arkansas*, 235 U. S. 350, 369, ante, 265, 274, 35 Sup. Ct. Rep. 99."

> *Michigan C. R. Co. v. Michigan R. Commission*, 236 U. S. 615, 35 Sup. Ct. Rep. 422, 59 L. ed. 750, at page 758.

It is apparent, it is submitted, that the carrying capacity in tons of the trucks for which the licenses are prescribed (in section 8512 of the Act) has a direct and immediate relation to the amount of use and wear and tear which said vehicles will impose upon the highways. Hence the State Legislature was fully justified in adopting this criterion of the carrying capacity of the trucks as the basis for fixing the amount of the license. Of course it is humanly probable that the trucks of the greater carrying capacity will be larger and carry greater loads, and hence will impose a greater use upon the highways and produce greater wear and tear thereon. Hence, under every principle of reason, the amount of the licenses might well be graduated in accordance with the carrying capacity of the vehicles in question.

It is hard to conceive of any better basis for fixing the amount of such license fees, but even if some more scientific and accurate criterion might be devised it is submitted that the practical convenience of such a classification, when taken in connection with its reasonablness, is sufficient to justify its adoption.

"The practical convenience of such a classification," as was stated by this Court in the *Continental Baking Company* case, above, though in regard to a different matter, "is not to be disregarded in the interest of a purely theoretical or scientific uniformity." *Columbus & G. R. Co. v. Miller,* 283 U. S. 96, 101, 75 L. ed. 861, 866, 51 S. Ct. 392; *Dow v. Beidelman,* 125 U. S. 680, 691, 31 L. ed. 841, 844, 2 Inters. Com. Rep. 56, 8 S. Ct. 1028; *New York, N. H. & H. R. Co. v. New York,* 165 U. S. 628, 633, 634, 41 L. ed. 853-855, 17 S. Ct. 418; *Chicago, R. I. & P. R. Co. v. Arkansas,* 219 U. S. 453, 55 L. ed. 290, 31 S. Ct. 275; *Chesapeake & O. R. Co. v. Conley,* 280 U. S. 513, 522, 57 L. ed. 1597, 1603, 33 S. Ct. 985; *St. Louis, I. M. & S. R. Co. v. Arkansas,* 240 U. S. 518, 521, 60 L. ed. 776, 779, 36 S. Ct. 443; *Wilson v. New,* 243 U. S. 332, 341, 354, 61 L. ed. 755, 770 776, L. R. A. 1917E, 938, 37 S. Ct. 298, Ann. Cas. 1918A, 1024; *Clark v. Maxwell,* 282 U. S. 811, 75 L. ed. 726, 51 S. Ct.

211; *Chicago, R. I. & P. R. Co. v. United States*, 284 U. S. 80, 93, ante, 177, 184, 52 S. Ct. 87.

The argument suggested by the appellant in his statement as to the jurisdiction on this point to the effect that under this statute this last tax would have to be paid by an interstate carrier for a single trip into this state, seems to us to be a far fetched and unreasonable interpretation of the statute, particularly in view of the express provision of section 8522 of the Act to the effect that the provisions of the Act should not be construed "to prevent the use or hiring of any motor vehicle for the purpose of making some particular trip, where the owner of such motor vehicle does not make such transportation a business."

Certainly we apprehend it would not be held that the making of a single trip into this state would constitute making "such transportation a business" so as to bring such carrier within the operation of the statute. In any event this alleged or fancied basis of objection is inapplicable to the appellant, since it has been, in effect, admitted by the appellant that he is regularly in the business of motor transportation over the highways of the State of South Carolina and also in interstate operations (see paragraphs 2, 3 and 4 of the petition, and paragraphs 1 and 2 of the answer; and also see appellant's reply and the affidavit of W. W. Goodman, thereto attached).

Again it is submitted that the holding of this Honorable Court in the above cited *Continental Baking Company* case that "mere hypothetical and fanciful illustrations" of illegalities in the Act must be disregarded, is applicable also to this contention.

The cases cited by the appellant in his statement as to the jurisdiction in support of his contention on this point (*Interstate Transit, Inc., v. Lindsey*, 283 U. S. 183, 75 L. ed. 953; *Clark v. Poor*, 274 U. S. 554, 71 L. ed. 1199), not only failed to support appellant's contentions, but on the contrary are di-

rectly authority for our views as herein above stated. In the case of *Clark v. Poor, supra*, the tax was graduated, as stated by this Honorable Court, "according to the number and capacity of the vehicles used." This Court upheld this tax even as applied to those engaged exclusively in interstate operations.

"The highways are public property"

said this Court, in rendering its decision.

> "Users of them, although engaged exclusively in interstate commerce, are subject to regulation by the state to insure safety and convenience and the conservation of the highways. *Morris v. Duby*, No. 372, decided April 18, 1927 (274 U. S. 135, ante, 966, 47 Sup. Ct. Rep. 548). Users of them, although engaged exclusively in interstate commerce, may be required to contribute to their cost and upkeep. Common carriers for hire, who make the highways their place of business, may properly be charged an extra tax for such use. *Hendrick v. Maryland*, 235 U. S. 610, 59 L. ed. 385, 35 Sup. Ct. Rep. 140; *Kane v. New Jersey*, 242 U. S. 160, 61 L. ed. 222, 37 Sup. Ct. Rep. 30; *Hess v. Pawloski*, No. 263, decided May 16, 1927 (274 U. S. 352, ante, 1091, 47 Sup. Ct. Rep. 632). Compare *Packard v. Banton*, 264 U. S. 140, 144, 68 L. ed. 596, 607, 44 Sup. Ct. Rep. 257."

Likewise in the case of *Interstate Transit, Inc., v. Lindsey*, while the particular tax therein involved was held and construed to be a tax upon the privilege of engaging in interstate commerce, and hence invalid, the Court nevertheless recognized and stated that the State "may impose even upon motor vehicles engaged exclusively in interstate commerce a charge as compensation for the use of the public highways, which is a fair contribution to the cost of constructing and maintaining them and of regulating the traffic thereon (*Kane v. New Jersey*, 242 U. S. 160, 168, 169, 61 L. ed. 222, 227, 228, 37 S. Ct. 30; *Clark v. Poor*, 274 U. S. 554, 71 L. ed. 1199, 47 S. Ct. 702; *Sprout v. South Bend, supra* (277 U. S. 169, 170, 72 L. ed. 836 837, 62 A. L. R. 45, 48 S. Ct. 502))", and also that where it

appears that the tax or license is levied for such purpose, "it will be sustained unless the tax payer shows that it bears no reasonable relation to the privilege of using the highways, or is discriminatory.

Hendrick v. Maryland, 235 U. S. 610, 612, 59 L. ed. 385, 35 S. Ct. 140; *Interstate Busses Corp. v. Blodgett*, 276, U. S. 245, 250-252, 72 L. ed. 551, 554, 555, 48 S. Ct. 230. Compare *Interstate Busses Corp. v. Holyoke Street R. Co.* 273 U. S. 45, 51, 71 L. ed. 530, 534, 47 S. Ct. 298."

IV.

General Appropriation Act of 1932 Not properly Involved

As to the contention advanced in Point 4 and in Assignment of Errors No. 4, it is sufficient to point out that this point relates solely to the contemplated appeal by the *Blalock Motor Express, Inc.*, which has been abandoned, and to the General Appropriation Act of 1931, which is not in any sense involved in this case. In fact, the General Appropriation Act of 1932, in this respect, so far as the levying of an assessment upon the gross receipts of the motor vehicle carriers is concerned, is different from the 1931 Act; also the abandonment of the Blalock Motor Express, Inc. appeal renders this point entirely academic.

As to the contention sought to be advanced in Point 5 (c) in the papers served on appellees' counsel of May 23, 1933, it is sufficient, it is submitted, to point out that this contention was not raised in the answer nor presented in any form to the South Carolina Supreme Court, or even in the petition for appeal or the Assignment of Errors therein contained, or even in the statement as to the jurisdiction, thereto attached. The contention in question seems to be that the provision of the General Appropriation Act of 1932 (sec. 34, Act No. 897, XXXVII S. C. Statutes at Large, 1557 at p. 1606), levying an assessment upon the motor carriers of the state for the support of the Railroad Commission, is invalid for the alleged reason that such assessment is not

in lieu of all other taxes. This alleged point was not only not presented in any form in the Court below, or touched upon by the Court in its decision, but was entirely beyond the scope of the issues in this case, since the suit itself was brought, as was stated in the petition (par. 7) for the purpose of enforcing the Motor Regulatory Act of 1925 as amended (now embodied in chapter 162 of the Code of 1932, sections 8507–8530), and did not in any way relate to the Act mentioned in said point—to-wit, section 897 of the 1932 Code, which was the General Appropriation Act for that year.

SUMMARY AND CONCLUSION

From all the foregoing reasons and many others which will no doubt occur to this Honorable Court, it is respectfully submitted that the judgment of the South Carolina Supreme Court should be affirmed by this Honorable Court, and the appeal dismissed.

The only question involved in this appeal, it seems to us, to merit serious consideration is the question as to the exemption in favor of farmers or dairymen hauling farm or dairy products. As to this point it is respectfully submitted that a valid distinction should be made in favor of farmers or dairymen hauling farm and dairy products, inasmuch as the evidence in this case clearly discloses that farmers and dairymen hauling farm and dairy products will and do make a much less frequent and less burdensom use of the highways than the appellants and others regularly engaged in the business of motor transporation for hire and also because farming and dairying and other agricultural operations ar entitled, by reason of their lying at the basis of the economic structure of the State of South Carolina, to special consideration at the hands of the South Carolina Legislature. This principle is established and applied by many of the decisions of this Honorable Court, and it is respectfully submitted is peculiarly applicable to the case at bar. Also the license fees being based on carrying capacity in tons of the

motor vehicles in use, are valid and reasonable as bearing a reasonable relation to the probable use to be made of the highways by the motor vehicles in question.

The remaining contentions advanced by the appellant in regard to the cargo insurance and in regard to having their rates and fares regulated by the South Carolina Railroad Commission, are mere fanciful and hypothetical objections, and hence will be disregarded by this Court.

It is, therefore, respectfully submitted that this appeal is without merit, and the judgment of the South Carolina Supreme Court should be affirmed.

JOHN M. DANIEL, Attorney General,
IRVINE F. BELSER, Special Counsel,
Attorneys for Appellees.

SUPREME COURT OF THE UNITED STATES.

No. 94.—October Term, 1933.

M. D. Hicklin, Individually, etc., Appellant,
vs.
J. C. Coney, Earle R. Ellerbe, Sam C. Blease, et al., as Members of and constituting the Railroad Commission of South Carolina.

Appeal from the Supreme Court of the State of South Carolina.

[December 4, 1933.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The Railroad Commission of South Carolina brought this suit in the original jurisdiction of the Supreme Court of the State seeking the enforcement of the state statutes regulating transportation by motor vehicles.[1] The petition alleged that the respondents below, including the present appellant, fell within Class "F" of motor vehicle carriers, that is, those known as contract carriers of property, not proposing to operate upon a regular schedule or over a regular route, and that they were carrying on their business on the public highways without having obtained the required certificates or paying the prescribed license fees. Appellant demurred to the petition and also made return and answer. The petitioners filed reply. Appellant contended that the statutory requirements, as applied to him as a private contract carrier, denied the equal protection of the laws and deprived him of due process of law in violation of the Fourteenth Amendment, and also, as he was engaged in interstate transportation, were repugnant to the commerce clause of the Federal Constitution. The Supreme Court of the State decided the Federal questions adversely to these contentions. 168 S. C. 440.

[1]Sections 8507 to 8530, Chapter 162 of the Code of 1932; Acts of 1925, p. 252, of 1928, p. 1238, of 1930, pp. 1068, 1100, 1327, and of 1931, p. 145.

First. It was competent for the State in exercising its control over the use of the highways to make reasonable regulations governing that use by private contract carriers. These regulations may require on the part of interstate as well as intrastate carriers the payment of reasonable license fees and the filing of insurance policies to protect the interests of the public by securing compensation for injuries to third persons and their property from the negligent operations of such carriers. *Continental Baking Co.* v. *Woodring* 286 U. S. 352, 365, 366; *Stephenson* v. *Binford,* 287 U. S. 251, 274, 277. The statutory requirements, in this instance, do not compel private contract carriers to become common carriers. *Stephenson* v. *Binford, supra,* pp. 265, 275. The contention that private contract carriers are required to carry "cargo insurance" (*Michigan Commission* v. *Duke,* 266 U. S. 570, 577) is unavailing in view of the construction to the contrary placed upon the statute by the state court. That court said:

"Our statute, however, like that construed in the *Stephenson* case, expressly recognizes the distinction between common carriers and private contract carriers; and from an examination of the entire act it is clear that the Legislature did not intend to put common carriers and private contract carriers on the same footing with regard to the matters here complained of. We think, and so hold, that in the case of private carriers, or contract carriers, the provisions of section 8511 extend no further than to require such carriers to execute an indemnity bond, as the commission may prescribe under the provisions of the act, for the protection of the public receiving injury, either in person or in property, by reason of any act of negligence of such private or contract carriers. We do not think it was the intent of the Legislature, in the passage of the act, to require contract carriers to obtain and carry cargo insurance, and we construe the act as not imposing upon them such requirement".

Appellant complains of this construction of the statute as being contrary to its terms, but that question is not for us. The decision of the state court is controlling as to the meaning and extent of the statutory requirements. *St. Louis, Southwestern Rwy. Co.* v. *Arkansas,* 235 U. S. 350, 362; *Knights of Pythias* v. *Meyer,* 265 U. S. 30, 32, 33; *American Railway Express Co.* v. *Royster Guano Co.,* 273 U. S. 274, 280. Nor does the statute as construed exhibit a fatal defect of indefiniteness. Its requirements as to the appellant, as the state court has defined them, are not uncertain.

Another objection, that the Railroad Commission was authorized to regulate the rates of private contract carriers, was answered by the state court in saying that the Commission had never exercised such a power, "if any it has under the act", and hence that appellant had no ground for complaint. This is an adequate answer here, on the present showing, as the Court does not deal with academic contentions. *Stephenson* v. *Binford, supra,* p. 277.

Second. Appellant insists that an undue burden is placed upon interstate commerce because the license fees are based on the "carrying capacity" of the vehicles. The state court held that the fees "are collected, as provided for by section 8517, for the purpose of maintaining the public highways over which such motor vehicles shall operate, as compensation for their use". The statute provides for the segregation, for this purpose, of the moneys collected. See *Clark* v. *Poor,* 274 U. S. 554, 555-557. In this view the fees are not open to the objection raised in *Interstate Transit, Inc.* v. *Lindsey,* 283 U. S. 183, 186, 188. Carrying capacity, the size and weight of trucks, unquestionably have a direct relation to the wear and hazards of the highways. It is for this reason that the authority of the State to impose directly reasonable limitations on the weight and size of vehicles, although applicable to interstate carriers, has been sustained. *Morris* v. *Duby,* 274 U. S. 135, 143; *Sproles* v. *Binford,* 286 U. S. 374, 388, 389. As the State may establish such regulations directly, the State may adjust its license fees, otherwise valid as being reasonable and exacted as compensation for the use of the highways, according to carrying capacity in furtherance of the same purpose. *Clark* v. *Poor, supra.*

Third. The contention that appellant has been denied the equal protection of the laws is based on the discrimination resulting from the exemption of "farmers or dairymen, hauling dairy or farm products; or lumber haulers engaged in transporting lumber or logs from the forests to the shipping points". Section 8508. Reliance is placed on our decision in *Smith* v. *Cahoon,* 283 U. S. 553. In that case, the statute applied to all carriers for compensation over regular routes and exempted from its provisions "any transportation company engaged exclusively in the transporting of agricultural or horticultural, dairy or other farm products and fresh and salt fish and oysters and shrimp from the point of pro-

duction to the assembling or shipping point en route to primary market, or to motor vehicles used exclusively in transporting or delivering dairy products." This distinction was thus established between all carriers, and between private carriers, notwithstanding the fact that they were "alike engaged in transporting property for compensation over public highways between fixed termini or over a regular route". The Court was unable to find any justification for this discrimination between carriers in the same business and operating under like circumstances, that is, between those who carried for hire farm products, or milk or butter, or fish or oysters, and those who carried for hire bread or sugar, or tea or coffee, or groceries in general, or other useful commodities. *Id.*, pp. 566, 567.

In *Continental Baking Co.* v. *Woodring, supra,* pp. 372, 373, the statutory exemption ran to one "who is carrying his own livestock and farm products to market or supplies for his own use in his own motor vehicles". Attention was called to the factual basis for the distinction as it had been pointed out by the District Court, which found a practical difference between the case of those "who operate fleets of trucks in the conduct of their business and who use the highways daily in the delivery of their products to their customers" and that of "a farmer who hauls his wheat or livestock to town once or twice a year". This Court said that the legislature in making its classification was entitled to consider frequency and character of use and to adapt its regulations to the classes of operations which by reason of their habitual and constant use of the highways brought about the conditions making regulation imperative and created the necessity for the imposition of a tax for maintenance and reconstruction. The Court quoted the observation in *Alward* v. *Johnson,* 282 U. S. 509, 513, 514: "The distinction between property employed in conducting a business which requires constant and unusual use of the highways, and property not so employed, is plain enough".

The exemptions in the instant case are not as limited as that in *Continental Baking Co.* v. *Woodring,* but they differ materially from that found to be objectionable in *Smith* v. *Cahoon.* The state court thus construed the scope, and described the effect, of the exemption in favor of farmers and dairymen: "Unquestionably, the use by farmers and dairymen for the transportation of farm and dairy products is seasonal and involves only a moderate use

of the highways; and the exemption here is further limited by the fact that it can apply only to one whose principal business is that of a farmer or dairyman and not to one merely incidentally engaged in farming or dairying". Further, in its pleading, the Railroad Commission averred that it had uniformly construed the statute "as exempting farmers and dairymen only when hauling their own product, or only when hauling them occasionally and not as a regular business" and had adopted a formal regulation to that effect.[2] In support of its pleading, and made a part of it, the Commission presented an affidavit by the Superintendent of the Motor Transportation Division of the Commission showing the manner in which the statute had been applied.

The state court in its opinion said that it reached its conclusion as to the validity of the statutory provision "independently of the construction placed by the Railroad Commission upon the contested provision of the Act". And the court pointed out that that construction was "in part" unsound inasmuch as "one hauling his own products in his own motor vehicle" did not come within the purview of the Act and no provision for his exemption was necessary. "The exemption", said the court, "can refer only to farmers and dairymen hauling farm and dairy products for compensation". The state court, however, did not express disagreement with the Commission's construction set forth in its regulation, that the exemption applied "to farmers and dairymen who occasionally, but do not regularly as a part of an established business, haul farm and/or dairy products for others for hire, but that persons who may also be engaged in part in farming operations but who make a regular business of transporting farm and/or

[2]This regulation is as follows: "The proviso under Section 2 of Act No. 170 of the Acts of 1925, as amended, providing that nothing contained in said section shall apply to farmers or dairymen hauling dairy or farm products is construed by the Railroad Commission in the performance of its duties in the enforcement of said Act to mean that nothing in the said section shall apply to farmers or dairymen hauling their own dairy or farm products, or to farmers and dairymen who occasionally, but do not regularly as a part of an established business, haul farm and/or dairy products for others for hire, but that persons who may also be engaged in part in farming operations but who make a regular business of transporting farm and/or dairy or other products for others for hire are not to be deemed farmers or dairymen for the purpose of this Act, and hence are required to comply with the act in all respects like other persons engaged in motor transportation for hire."

dairy or other products for others for hire are not to be deemed farmers or dairymen for the purpose of this Act, and hence are required to comply with the Act in all respects like other persons engaged in motor transportation for hire". Nor have we anything before us to show that the statute is being enforced and the exemption construed in any other sense. Upon the present record, it appears that the exemption is applied with two limitations, *first*, that, as construed by the state court, it can refer only "to one whose principal business is that of a farmer or dairyman and not to one merely incidentally engaged in farming or dairying", and, *second*, under the construction of the Commission in enforcing the statute—a construction not disapproved by the state court—that it applies only to farmers and dairymen who occasionally, and not as a regular business, transport farm or dairy products for compensation. We cannot say that a classification based on such a use of the highways is an arbitrary one and thus encounters constitutional objection.

The exemption in favor of those hauling lumber and logs "from the forest to the shipping points" relates to a limited class of transportation simply to places of shipment and does not appear to be unreasonable. See *Sproles* v. *Binford, supra,* p. 394.

The judgment of the state court is affirmed.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.